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No. 41 ORIGINAL

FILED

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1969

STATE OF OHIO, EX REL., PAUL W. BROWN,
Attorney General of Ohio, State House Annex,
Columbus, Ohio 43215,

Plaintiff,

v.

WYANDOTTE CHEMICALS CORPORATION, A corporation ex-
isting under the laws of Michigan, located at 1609
Biddle Avenue, Wyandotte, Michigan,

and

DOW CHEMICAL COMPANY OF CANADA, LIMITED, A cor-
poration existing under the laws of the Dominion of
Canada, located at Sarnia, Ontario, Canada,

and

THE DOW CHEMICAL COMPANY, A corporation existing
under the laws of Delaware, located at Midland,
Michigan,

Defendants.

MOTION FOR LEAVE TO FILE COMPLAINT,
COMPLAINT AND
STATEMENT AND BRIEF IN SUPPORT OF MOTION

PAUL W. BROWN
Attorney General of Ohio
State House Annex
Columbus, Ohio 43215

INDEX

	Page
MOTION FOR LEAVE TO FILE COMPLAINT	1
COMPLAINT	3
STATEMENT AND BRIEF IN SUPPORT OF MOTION	11
Jurisdiction	11
Purpose of the Proposed Action	12
Direct Precedents Invoking Original Jurisdiction of This Court	12
Need for the Aid of This Court	13
Conclusion	14

CITATIONS

Cases:

<i>Georgia v. Tennessee Copper Company</i> , 206 U.S. 230 (1907)	13
<i>New Jersey v. New York City</i> , 283 U.S. 473 (1931)	13

Treaty:

Treaty Between the United States and Great Britain Relating to Boundary Waters Between the United States and Canada, Dated January 11, 1909, and Proclaimed May 13, 1910, 36 Stat. 2448	14
---	----

Statutes:

Constitution of the United States, Article III, Section 2, Clause 2	4, 12
United States Code, Title 28, Section 1251	4, 12
Revised Code of Ohio, Section 123.03	13

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Attorney General of Ohio, State House Annex,
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Plaintiff,

v.

WYANDOTTE CHEMICALS CORPORATION, A corporation existing under the laws of Michigan, located at 1609 Biddle Avenue, Wyandotte, Michigan,

and

DOW CHEMICAL COMPANY OF CANADA, LIMITED, A corporation existing under the laws of the Dominion of Canada, located at Sarnia, Ontario, Canada,

and

THE DOW CHEMICAL COMPANY, A corporation existing under the laws of Delaware, located at Midland, Michigan,

Defendants.

MOTION FOR LEAVE TO FILE COMPLAINT

The State of Ohio by its Attorney General Paul W. Brown, ex rel., asks leave to file its Complaint respectfully submitted herewith against Wyandotte Chemicals

Corporation, a corporation organized and existing under the laws of Michigan and therefore a citizen of Michigan, Dow Chemical Company of Canada, Limited, a corporation existing under the laws of the Dominion of Canada and therefore an alien, and The Dow Chemical Company, a corporation existing under the laws of Delaware and therefore a citizen of Delaware.

PAUL W. BROWN

Attorney General of Ohio
State of Ohio, ex rel.
Counsel for Plaintiff

April, 1970

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and

DOW CHEMICAL COMPANY OF CANADA, LIMITED, A corporation existing under the laws of the Dominion of Canada, located at Sarnia, Ontario, Canada,

and

THE DOW CHEMICAL COMPANY, A corporation existing under the laws of Delaware, located at Midland, Michigan,

Defendants.

COMPLAINT

The State of Ohio by its Attorney General brings this suit against the Defendants, Wyandotte Chemicals Corporation, The Dow Chemical Company, and Dow Chemical Company of Canada, Limited, and for its cause of action states:

4

I

Paul W. Brown is the duly appointed, qualified and acting Attorney General of the State of Ohio and in such capacity is authorized to bring and does bring this suit on behalf of the State of Ohio and its citizens.

II

The original jurisdiction of this Court is invoked under Article III, Section 2, Clause 2 of the Constitution of the United States and Title 28 U. S. C., Section 1251.

III

The Wyandotte Chemicals Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Michigan with its principal office and place of business at Wyandotte, Michigan. It has duly qualified itself to do business and does business in the State of Ohio.

IV

The Dow Chemical Company is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business at Midland, Michigan. It has duly qualified itself to do business and does business in the State of Ohio.

V

The Dow Chemical Company of Canada, Limited is a corporation organized, existing, and doing business under and by virtue of the laws of the Dominion of Canada and the Province of Ontario with its principal office and place of business at Sarnia, Ontario, Canada. It regularly does or solicits business, engages in a persistent course of conduct, and derives substantial revenue from goods used or consumed and services rendered in the

State of Ohio or has substantial contacts with the United States from which it derives benefits.

VI

At all times herein material, the Plaintiff State of Ohio was and now is the owner, in trust for and as guardian and protector thereof for its citizens and inhabitants, of Lake Erie from the Ohio shore to the international boundary between Ohio and the Dominion of Canada, being the center of said lake as confirmed by treaty between the United States and Great Britain dated January 11, 1909.

VII

Since time immemorial, Lake Erie has been and now is a natural body of fresh water bordered by the states of Ohio, Michigan, Pennsylvania, and New York and the Dominion of Canada. Water flows from Lake Huron into Lake St. Clair through the St. Clair River; water flows from Lake St. Clair into Lake Erie through the Detroit River. Lake Erie has been and now is frequented by great numbers of white bass, walleye, carp, perch, catfish, sheepshead, mullet, coho, and other fish. All of said fish in Ohio are owned by the State of Ohio to the extent fish in their wild state can be owned, and are held in trust by it for its citizens and inhabitants. All of said fish have been valuable items of food and diet for the people of Ohio and others. In addition to being a common fishery utilized by citizens and inhabitants of Ohio, Lake Erie has been a source of water supply for the citizens and inhabitants of Ohio and has been used as a place for recreation and relaxation by the citizens and inhabitants of Ohio.

VIII

Defendant Dow Chemical Company of Canada, Limited owns and operates in or near the city of Sarnia, Province of Ontario, Dominion of Canada a manufac-

turing plant in which it is engaged in the manufacture and processing, among other items, of products known as caustic soda and chlorine. In the manufacture and processing of said products said Defendant has utilized mercury or compounds thereof and has continually, intentionally, and knowingly since 1949 discharged said mercury or compounds thereof into the St. Clair River or tributaries thereto at the Canadian side thereof, some of which mercury or compounds thereof has flowed or has been carried into Lake Erie across the boundary between Canada and the United States and to and along the Ohio shore.

IX

Defendant Wyandotte Chemicals Corporation owns and operates in or near the city of Wyandotte, Michigan, a manufacturing plant in which it is engaged in the manufacture and processing, among other items, of products known as caustic soda and chlorine. In the manufacture and processing of said products said Defendant has utilized mercury or compounds thereof and has continually, intentionally, and knowingly for several years discharged said mercury or compounds thereof into the Detroit River or tributaries thereto at the Michigan side thereof, some of which mercury or compounds thereof has flowed or has been carried into Lake Erie and to and along the Ohio shore.

X

Defendant The Dow Chemical Company is the owner of all of the outstanding shares of capital stock of Defendant Dow Chemical Company of Canada, Limited. As such shareholder Defendant The Dow Chemical Company controls the actions of Defendant Dow Chemical Company of Canada, Limited and is responsible along with Defendant Dow Chemical Company of Canada, Limited for the discharge of such mercury or compounds thereof into Lake Erie or tributaries thereto.

XI

The mercury or compounds thereof which the Defendants have discharged into Lake Erie or tributaries thereto is a poison which is injurious to the natural conditions existing in the lake, to the fish and other wildlife, to the vegetation therein, to the water of the lake and which is presently or potentially injurious and deleterious to the health and safety of the citizens and inhabitants of Ohio; the introduction of poisonous mercury or compounds thereof into Lake Erie has altered and unless stopped will continue to alter the natural condition and ecological balance of Lake Erie adversely and to the damage of Lake Erie as a common fishery and as a place for recreation and relaxation. Defendants knew or should have known that the mercury or compounds thereof discharged and introduced by Defendants into Lake Erie or tributaries thereto is a material of such nature as to be dangerous in that it would presently and continually contaminate and pollute the waters of the lake, vegetation therein and the fish and other wildlife to the injury and damage of Lake Erie and of the citizens and inhabitants of Ohio. It is a matter of common and general knowledge that mercury and compounds thereof are poisonous and are injurious to health and safety of humans when introduced into the human body.

XII

Defendants were negligent and did not exercise due or common care in introducing poisonous mercury or compounds thereof into Lake Erie or tributaries thereto.

XIII

The introduction by Defendants of poisonous mercury or compounds thereof into Lake Erie or tributaries thereto is the direct and proximate cause of existing and future injury to Lake Erie, to the fish and other wildlife, to the vegetation and to the citizens and inhabitants

of Ohio; said acts of Defendants have caused damages to Plaintiff which are not yet determinable and are to be determined in this cause.

XIV

The conduct of Defendants in introducing poisonous mercury or compounds thereof into Lake Erie is concurrent and such conduct constitutes a public nuisance which must be abated in order to protect Lake Erie and the health and safety of the citizens and inhabitants of Ohio.

XV

To the best of Plaintiff's knowledge and belief, the Defendants or some of them continue and will so continue the wrongful act of introducing poisonous mercury or compounds thereof into Lake Erie or tributaries thereto unless restrained and enjoined by this Court. Plaintiff has no plain, speedy or adequate remedy at law. The injuries and damages caused to Lake Erie, to the fish and other wildlife, to the vegetation, and to the citizens and inhabitants of Ohio are irreparable; a determination must be made in this cause as to the extent to which said injuries and damage can be minimized by an order to Defendants to remove from Lake Erie and tributaries thereto the poisonous mercury and compounds thereof which they have introduced into Lake Erie and tributaries thereto.

XVI

By introducing poisonous mercury or compounds thereof into Lake Erie or tributaries thereto Defendants have violated and continue to violate statutes of Ohio, statutes of the United States and the provisions of a treaty to which the United States is a High Contracting Party; the continued violation of such statutes and treaty by Defendants further evidences that the wrongful conduct of Defendants constitutes a public nuisance.

WHEREFORE, Plaintiff prays:

1. That a decree be entered adjudging that the conduct of Defendants in introducing poisonous mercury or compounds thereof into Lake Erie or tributaries thereto constitutes a public nuisance and that such nuisance be abated.

2. That a decree be entered perpetually enjoining the Defendants and each of them from introducing poisonous mercury or compounds thereof into Lake Erie or any tributary thereto.

3. That a decree be entered requiring the Defendants and each of them to remove from Lake Erie and tributaries thereto the poisonous mercury and compounds thereof or, in the alternative, requiring Defendants to pay to Plaintiff as damages an amount not yet determined but to be determined in this cause sufficient to enable Plaintiff to remove said mercury and compounds thereof from Lake Erie and any tributaries thereto, said sum to be held in trust for and expended only for this purpose by Plaintiff; such decree to contain appropriate provisions for reporting to the Court on progress of removal so that appropriate enforcement of said decree can be implemented.

4. That a decree be entered adjudging that the Plaintiff recover from the Defendants damages in an amount not yet determined but to be determined in this cause compensating for the existing and future damages to Lake Erie, the fish and other wildlife, the vegetation and the citizens and inhabitants of Ohio.

5. That Plaintiff be awarded its costs of suit incurred herein and such other and further relief as this Court may deem proper and necessary.

PAUL W. BROWN
Attorney General of Ohio,
State of Ohio, ex rel.

April, 1970

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OCTOBER TERM, 1969

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STATE OF OHIO, EX REL., PAUL W. BROWN,
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Plaintiff,

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WYANDOTTE CHEMICALS CORPORATION, A corporation existing under the laws of Michigan, located at 1609 Biddle Avenue, Wyandotte, Michigan,

and

DOW CHEMICAL COMPANY OF CANADA, LIMITED, A corporation existing under the laws of the Dominion of Canada, located at Sarnia, Ontario, Canada,

and

THE DOW CHEMICAL COMPANY, A corporation existing under the laws of Delaware, located at Midland, Michigan,

Defendants.

STATEMENT AND BRIEF IN SUPPORT OF MOTION

Jurisdiction

This is an action by the State of Ohio against a Michigan corporation, a Delaware corporation, and a Canadian corporation. The Michigan and Delaware corporations are citizens of those states and the Canadian corporation is a citizen of Canada. The action is therefore proposed to be instituted in this Court under authority of

Article III, Section 2, Clause 2, of the Constitution of the United States and Title 28 U.S.C., Section 1251.

Purpose of the Proposed Action

It has been discovered that the waters and vegetation of Lake Erie have been polluted by poisonous mercury or compounds thereof and that the testing of fish caught in Lake Erie evidences a dangerously high concentration of poisonous mercury in the fish. It is alleged in the Complaint that the Defendants have for several years been discharging mercury or compounds thereof into tributaries of Lake Erie, which mercury or compounds thereof are industrial waste from manufacturing plants owned by Defendants. The Complaint prays that the Defendants be permanently enjoined from discharging mercury or compounds thereof into Lake Erie or tributaries thereto as their conduct constitutes a public nuisance; it is further prayed that this Court ascertain the damages which Plaintiff has suffered and that this Court order the removal of the mercury and compounds thereof from Lake Erie and tributaries thereto if that is found to be feasible; the prayer suggests that relief be granted either by ordering the Defendants to remove the mercury and compounds thereof or that Defendants be ordered to pay damages into a trust fund to be used only for the purpose of removing the mercury and compounds thereof from Lake Erie and the tributaries thereto.

Direct Precedents Invoking Original Jurisdiction of This Court

In 1907 the Attorney General of the State of Georgia successfully invoked the original jurisdiction of this Court in an action against the Tennessee Copper Company, a corporation existing under the laws of a state other than Georgia. This Court granted relief to the State of Georgia enjoining the Tennessee Copper Company from continuing to pollute the air and land in Geor-

gia with noxious fumes generated by its manufacturing plant in Tennessee, which pollution was found to constitute a public nuisance. *Georgia v. Tennessee Copper Company*, 206 U.S. 230 (1907).

In 1931, it was determined that the State of New Jersey could successfully invoke the original jurisdiction of this Court in an attempt to enjoin the city of New York from continuing a public nuisance created by discharging garbage into the Atlantic Ocean which polluted the New Jersey shores. In the New Jersey case, this Court in the exercise of its original jurisdiction appointed a special master to hear the complaint and to make recommendations. *New Jersey v. New York City*, 283 U.S. 473 (1931).

Need for the Aid of This Court

The seriousness of the problem and the need of an immediate and effective start toward its solution justifies the original action by this Court. By exercising this original jurisdiction at the request of the State of Ohio, this Court can give direction and immediacy to the national effort to control pollution.

Section 123.03 Revised Code of Ohio reads in pertinent part as follows:

"It is hereby declared that the waters of Lake Erie consisting of the territory within the boundaries of the state, extending from the southerly shore of Lake Erie to the international boundary line between the United States and Canada, together with the soil beneath and their contents, do now and have always, since the organization of the state of Ohio, belonged to the state as proprietor in trust for the people of the state, for the public uses to which it may be adapted, subject to the powers of the United States government, to the public rights of navigation, water commerce and fishery, and further subject to the property rights of littoral owners, in-

cluding the right to make reasonable use of the waters in front of or flowing past their lands. . . ."

The treaty between the United States and Great Britain dated January 11, 1909, and proclaimed May 13, 1910, confirms that Lake Erie is part of the boundary waters between the United States and Canada. Article IV of that treaty reads in pertinent part as follows:

"It is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other."

The potential for deadly consequences from the continued mercury pollution of Lake Erie cannot be overstated. Action must not be delayed until the citizens of Ohio and other states furnish yet another example to the world of the effects of mercury poison. Prior experience with mercury poisoning in Japan is a tragedy which serves as a warning. Between 1953 and 1960, 110 people were killed or severely disabled after eating fish caught in mercury polluted waters of Minamata Bay, Japan. There must not be a Lake Erie tragedy repeating the Minamata Bay tragedy. Action by this Court now can avoid this threat.

CONCLUSION

For the reasons stated, the motion for leave to file the complaint should be granted.

Respectfully submitted.

PAUL W. BROWN

Attorney General of Ohio
State of Ohio, ex rel.
Counsel for Plaintiff

April, 1970

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ROBERT SEAWER, CL.

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OCTOBER TERM, 1969.

STATE OF OHIO, ex rel, PAUL W. BROWN,
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WYANDOTTE CHEMICALS CORPORATION,
DOW CHEMICAL COMPANY OF CANADA, LIMITED
and

THE DOW CHEMICAL COMPANY,
Defendants.

BRIEF OF THE DOW CHEMICAL COMPANY
IN OPPOSITION TO PLAINTIFF'S MOTION
TO FILE COMPLAINT.

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TABLE OF CONTENTS.

QUESTIONS PRESENTED	1
STATEMENT OF CASE	2
SUMMARY OF ARGUMENT	4
ARGUMENT	8
I. Does the Court Lack Jurisdiction Because of the Provisions of the Boundary Waters Treaty, 1909, Between the United States and Great Britain, Proclaimed May 13, 1910, 36 Stat. 2448; TS 548 and the Principles of International Law?	8
A. The Subject Matter of the Proposed Com- plaint	8
II. Do the Allegations Set Out in the Proposed Com- plaint Sought to Be Filed by the State of Ohio Create a Cause of Action in Favor of the State of Ohio Under Article III, Section 2, Clause 2 of the Constitution of the United States and Title 28 U.S.C., Section 1251?	16
A. The State of Ohio Does Not Have a Cause of Action Under Ohio Revised Code, Section 123.03	16
B. The State of Ohio Does Not Have a Cause of Action Under Federal Law	18
C. Ohio's Proposed Complaint Does Not State a Cause of Action Under Federal Common Law	20
D. The State of Ohio Does Not Have a Cause of Action Under the Treaty 1909	21
III. Because of the Complex International Problems Involved, Can the Court Decline Jurisdiction and Refuse to Impose Judicial Decisions Upon the Parties Sought to Be Made Defendants in the Proposed Litigation?	25

II

A. This Court Should Decline to Exercise Jurisdiction Over the Subject Matter of the Proposed Litigation	25
B. The Proposed Complaint Submitted by Ohio Fails to State a Cause of Action Against Dow U. S.	27
C. This Court Does Not Have Jurisdiction Over the Person of Dow Canada	29
D. Since the Field of Water Development and Pollution Is Fraught With Complexities, This Court Can Dismiss the Proposed Litigation Because the Treaty 1909 Provides an Alternative Forum	30
CONCLUSION	33

III

TABLE OF AUTHORITIES.

Cases.

<i>Chy Lung v. Freeman</i> , 92 U.S. 275 (1875)	34
<i>Colorado v. Kansas</i> , 320 U.S. 383 (1943)	32, 36
<i>First Iowa Hydro-Electric Co-op v. F.P.C.</i> , 328 U.S. 152 (1946)	10
<i>Garrett v. Southern Railway Co.</i> , 278 F.2d 424 (6th Cir.), cert. denied, 364 U.S. 833 (1960)	28
<i>Georgia v. Pennsylvania R.R.</i> , 324 U.S. 439 (1945)	26, 31, 36
<i>Geofray v. Riggs</i> , 133 U.S. 258	10
<i>Hines v. Davidowitz</i> , 312 U.S. 52 (1941)	34
<i>Jordan v. Tashiro</i> , 278 U.S. 123	10
<i>Kentucky Electric Power Co. v. Norton Coal Mining Co.</i> , 93 F.2d 923 (6th Cir. 1938)	28, 35
<i>Kingston Dry Dock Co. v. Lake Champlain Transpor- tation Co.</i> , 31 F.2d 265 (2d Cir. 1929)	27
<i>Lowendahl v. Baltimore & O. R. Co.</i> , 247 App. Div. 144, 287 N.Y.S. 62 (1st Dep't 1936), aff'd 272 N.Y. 360, 6 N.E.2d 56 (1936)	28
<i>Massachusetts v. Mellon</i> , 262 U.S. 447 (1923)	20
<i>Massachusetts v. Missouri</i> , 308 U.S. 1 (1939)	26
<i>Missouri v. Holland</i> , 252 U.S. 416 (1920)	10
<i>Missouri v. Illinois</i> , 180 U.S. 208 (1901), 200 U.S. 496 (1905)	16, 30, 31
<i>Neilson v. Johnson</i> , 279 U.S. 47 (1929)	10, 34
<i>New Colonial Ice Co. v. Helvering</i> , 292 U.S. 435 (1934)	27
<i>New York v. New Jersey</i> , 256 U.S. 296 (1921)	33

IV

<i>North Dakota v. Minnesota</i> , 263 U.S. 365 (1923)	33
<i>Owl Fumigating Corp. v. Calif. Cyanide Co.</i> , 24 F.2d 718 (Del. 1928), <i>aff'd</i> , 30 F.2d 812 (3d Cir. 1929)	27, 35
<i>Pennsylvania v. Nelson</i> , 350 U.S. 497 (1956)	17
<i>Pollard v. Hagan</i> , 44 U.S. (3 How.) 212 (1845)	16
<i>Rice v. Santa Fe Elevator Corp.</i> , 331 U.S. 218 (1947)	18
<i>Ross, In re</i> , 140 U.S. 453	10
<i>Sanitary District of Chicago v. United States</i> , 266 U.S. 405 (1925)	10, 22
<i>Santovincenzo v. Egan</i> , 284 U.S. 30 (1931)	34
<i>Schooner Exchange, The, v. McFaddon</i> , 11 U.S. (7 Cranch) 116 (1812)	15, 26
<i>Spears v. Transcontinental Bus System</i> , 226 F.2d 94 (9th Cir. 1955), <i>cert. denied</i> , 350 U.S. 950 (1956)	27, 35
<i>Steven v. Roscoe Turner Aeronautical Corp.</i> , 324 F. 2d 157 (7th Cir. 1963)	27, 35
<i>Trail Smelter Arbitral Decision, The</i> (United States <i>v. Canada</i>), 35 AM. J. INT'L L. 684 (1939)	12, 13
<i>Tucker v. Alexandroff</i> , 183 U.S. 424	10
<i>United States v. Belmont</i> , 301 U.S. 324 (1937)	34
<i>United States v. California</i> , 332 U.S. 19 (1947)	20
<i>United States v. Curtiss-Wright Export Corp.</i> , 299 U.S. 304 (1936)	21, 35
<i>United States v. Pink</i> , 315 U.S. 203 (1942)	22, 24, 34
<i>United States v. Reading Co.</i> , 253 U.S. 26 (1920)	27, 35
<i>Ware v. Hylton</i> , 3 U.S. (3 Dall.) 199 (1796)	9

Constitution.

Constitution of the United States:

Art. I, Sec. 10	9
Art. III, Sec. 2, Cl. 2	1, 2, 26
Art. VI, Cl. 2	4, 9, 17, 18

Treaties.

Boundary Waters Treaty, 1909, between the United States and Great Britain, proclaimed May 13, 1910, 36 Stat. 2448; TS 548	1, 2, 4, 8, 10, 11, 17, 21, 34
---	--------------------------------

Statutes.

Clean Water Restoration Act of 1966 [Act of November 3, 1966, Section 206, 80 Stat. 1250, amending 33 U.S.C., Section 466 G (Supp. I, 1965)]	18, 19
Ohio Revised Code, Sec. 123.03	16, 17, 18, 35
28 U.S.C., Sec. 1251	1, 2, 26

Books and Periodicals.

4 A.L.R. 1377 (1915)	22
17 A.L.R. 635 (1922)	22
134 A.L.R. 882 (1941)	22
<i>Federalist, The</i> , New Edition (1942), Hamilton, Madison & Jay (1788)	14, 15
Forer, <i>Water Supply; Suggested Federal Regulation</i> , 75 HARV. L. REV. 332 (1961)	14
3 INT'L ARB. AWARDS 1905 at 1963 (1949)	13
Laylin and Bianchi, <i>The Role of Adjudication in International River Disputes</i> , 53 AM. J. INT'L. 30 (1959)	14
MacKay, 22 AM. J. INTERNAT. L. 292	4

VI

Oppenheim, 1 <i>INTERNATIONAL LAW</i> , at 330 (7th Ed., Lauterpacht 1948)	17
<i>Original Jurisdiction of the United States Supreme Court, The</i> , 11 <i>STAN. L.R.</i> 665 (1959)	31
Read, <i>The Trail Smelter Dispute</i> , 1 <i>CAN. YB. INT'L L.</i> 213 (1963)	13
Rogers, 17 <i>FEDERAL BAR NEWS</i> , June, 1970, No. 6 at 161	24, 25
11 <i>STAN. L.R.</i> 665 (1959)	36
<i>The Law of International Drainage Basins</i> —Edited by A. H. Garretson, R. D. Hayton and C. J. Olmstead for The Institute of International Law, at 110	13, 14
Trelease, <i>Federal Limitations on State Water Law</i> , 10 <i>BUFF. L. REV.</i> 399 (1961)	22
Waite, <i>The International Joint Commission—Its Impact on Land Use</i> , 13 <i>BUFF. L. REV.</i> 93 (1963-4)	4, 33, 36

Miscellaneous.

51 <i>Dept. of State Bull.</i> 498 (Oct. 26, 1964)	5
Hearings on S. 2987, Senate Doc. 2947, 89th Congress, 2nd Sess. 435 (1966)	19, 20
<i>International Law Association Committee Report to Tokyo Conference</i> (1964)	14
<i>Report of the International Joint Commission (United States and Canada) on the Pollution of Boundary Waters</i> (1951)	11, 36
<i>Report to the International Joint Commission on the Pollution of Lake Erie, Lake Ontario and the International Section of the St. Lawrence River</i> , Vol. 1 (Summary) and Vol. 2 (Lake Erie) (1969)	4-5, 7, 12, 31, 36

VII

Rules of Practice.

Federal Rules of Civil Procedure, Rule 4 (E)	29
Rules of the Supreme Court of the United States, Rule 9 (8)	29

In the Supreme Court of the United States

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Plaintiff,

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DOW CHEMICAL COMPANY OF CANADA, LIMITED

and

THE DOW CHEMICAL COMPANY,

Defendants.

BRIEF OF THE DOW CHEMICAL COMPANY IN OPPOSITION TO PLAINTIFF'S MOTION TO FILE COMPLAINT.

QUESTIONS PRESENTED.

- I. Does the court lack jurisdiction because of the provisions of the Boundary Waters Treaty, 1909, between the United States and Great Britain, proclaimed May 13, 1910, 36 Stat. 2448; TS 548 and the Principles of International Law?
- II. Do the allegations set out in the proposed complaint sought to be filed by the State of Ohio create a cause of action in favor of the State of Ohio under Article III, Section 2, Clause 2 of the Constitution of the United States and Title 28 U.S.C., Section 1251?
- III. Because of the complex international problems involved, can the court decline jurisdiction and refuse to impose judicial decisions upon the parties sought to be made defendants in the proposed litigation?

STATEMENT OF CASE.

The State of Ohio (hereinafter referred to as Ohio) seeks to invoke the original jurisdiction of this Court for leave to file a Complaint against Wyandotte Chemicals Corporation (hereinafter referred to as Wyandotte), a Michigan corporation, Dow Chemical Company of Canada, Limited (correct name being Dow Chemical of Canada, Limited), hereinafter referred to as Dow Canada, a Canadian corporation and The Dow Chemical Company (hereinafter referred to as Dow U. S.), a Delaware corporation, as defendants under authority of Article III, Section 2, Clause 2 of the Constitution of the United States and Title 28 U.S.C., Section 1251.

Ohio asserts Wyandotte, Dow Canada and Dow U. S. have, for a number of years, introduced alleged poisonous mercury or compounds thereof, as industrial wastes, into the tributary waters of Lake Erie and therefrom into Lake Erie. Said waters being part of the international boundary waters between Canada and the United States referred to in the Boundary Waters Treaty of 1909 (hereinafter referred to as Treaty) signed January 11, 1909 and proclaimed by the United States and Great Britain on May 13, 1910.

Ohio claims Dow Canada introduced said mercury or compounds thereof into the St. Clair River "at the Canadian side thereof."

Ohio joins Dow U. S. because it says Dow U. S. owns all the outstanding shares of capital stock of Dow Canada and therefore "controls the actions" of Dow Canada. Ohio claims Dow U. S. "is responsible along with" Dow Canada "for the discharge of such mercury or compounds thereof into Lake Erie or tributaries thereto."

Ohio says it is the owner of Lake Erie "from the Ohio shore to the international boundary between Ohio and the

Dominion of Canada"; that it is the owner of all of the fish in Ohio, to the extent said fish can be owned, and that said fish are held in trust by it for its citizens and inhabitants.

Wyandotte has no connection whatsoever with Dow U. S. or Dow Canada.

Ohio's proposed Complaint prays that the defendants be permanently enjoined from discharging "poisonous" mercury or compounds thereof into Lake Erie or tributaries thereto because such conduct constitutes a public nuisance. Ohio asks this Court to ascertain the damages which Ohio has suffered; and that this Court order the removal of said mercury and compounds thereof from Lake Erie and tributaries thereto if that is found to be feasible. Ohio also suggests that relief be granted either by ordering the defendants to remove said mercury and compounds thereof or that the defendants be ordered to pay damages into a trust fund to be used for the sole purpose of removing said mercury and compounds thereof from Lake Erie and the tributaries thereto.

Dow U. S., in opposing Ohio's Motion, denies it is responsible "along with" Dow Canada for the alleged discharge of "poisonous" mercury or compounds thereof into Lake Erie. Dow U. S. has never introduced any "poisonous" mercury or compounds thereof into any of the international boundary waters referred to in Ohio's proposed Complaint.

Dow U. S. does not operate or maintain Dow Canada's Sarnia, Ontario plant.

Dow Canada's chlorine and caustic soda plant is located entirely within Canadian territory, across the international boundary from Port Huron, Michigan. It is managed and operated by Canadians. Dow Canada carries on its business as an independent entity in Canada. It is

subject to the jurisdiction of the Ontario Water Resources Commission and laws of Canada with respect to preventing unsafe mercury discharges into the Canadian side of the St. Clair River.

SUMMARY OF ARGUMENT.

Article VI, Clause 2 of the Constitution declares *treaties shall be the supreme law of the land*.

The Boundary Waters Treaty (hereinafter referred to as Treaty) was negotiated and signed in 1909 by the United States and Great Britain. It was proclaimed on May 13, 1910 (36 Stat. 2448; TS 548). The Treaty provided for the establishment of an International Joint Commission which was given judicial power to approve projects affecting boundary waters and investigative powers to supervise the use or results of the use of the international boundary waters by the United States and Canada. See Articles VIII, IX and X of the Treaty and Preamble, 36 Stat. 2448; MacKay, 22 AM. J. INTERNAT. L. 292 at 296-297 and 312-314; Waite, 13 BUFF. L. REV. 93 at 100 (1963-64).

The international boundary waters include the St. Clair River, Lake St. Clair, Detroit River and Lake Erie.

References of August 2, 1912, April 1, 1946 and October 7, 1964 (International Joint Commission Dockets Nos. 4, 53 and 55) under Article IX of the Treaty by the governments of Canada and the United States to the International Joint Commission authorized it to investigate and report to the governments "1. To what extent and by what causes and in what localities have the boundary waters between the United States and Canada been polluted so as to be injurious to the public health and unfit for domestic or other uses." (International Joint Commission Docket No. 4). See also *Report to the Interna-*

tional Joint Commission, Vol. 2—Lake Erie at VI—Introduction (1969); 51 Dept. of State Bull. 498 (Oct. 26, 1964).

Said References make it clear that all problems arising as a result of the pollution of international boundary waters be resolved under principles of the Treaty and international law. Since the sovereign powers (United States and Canada) have decided all international boundary pollution problems are to be investigated and supervised by the International Joint Commission, this Court has no jurisdiction over the subject matter of the proposed litigation.

Ohio cannot enact legislation which would have any extra-territorial application upon the conduct of Dow Canada. Such power can only be exercised by the federal government. Thus, Ohio does not have a state-created cause of action in the litigation sought here.

The pollution provision of the Treaty (Article IV) does not conflict with the generally recognized principle of international law to the effect that an individual or a quasi-sovereign (Ohio) has no inherent right to participate in the litigation of international controversies. Under the Treaty, the sovereigns (Canada and United States) have undertaken to supervise and control the activities of their own inhabitants if the effect thereof causes injury to the territory or inhabitants of the other sovereign, under principles of international law.

Therefore, since the subject matter of Ohio's proposed litigation involves the alleged pollution of international boundary waters, the Treaty provisions pre-empt Ohio's claimed right to sue Dow U. S., Dow Canada and Wyandotte.

Ohio has no rights under federal law because the Clean Water Restoration Act of 1966 is limited solely to controlling the conduct of the inhabitants of the United

States, *within the territory of the United States*. The legislation has no extra-territorial application upon the conduct of aliens (Dow Canada) in a foreign territory (Canada).

Further, since the subject matter of the proposed litigation concerns itself with a matter of foreign affairs, to wit: pollution of Lake Erie, an international water basin, Ohio, a quasi-sovereign, cannot bring this proposed action as *parens patriae*, since the powers and interests of the United States are paramount and pre-empt Ohio's claimed right to litigate the international issues here involved.

The executive and legislative branches of the United States and the government of Canada are committed to the principle that all controversies involving the pollution of the international boundary waters should be resolved by cooperative study and negotiation, rather than by judicial decree.

Judicial action by this Court would be contrary to all of the diplomatic agreements heretofore reached between the United States and Great Britain (Canada) which are now being implemented through the International Joint Commission insofar as all pollution problems involving the international boundary waters are concerned.

Dow Canada has taken effective action to prevent unsafe discharges of mercury into the Canadian side of the St. Clair River pursuant to the orders and continuing supervision of Canadian authorities.

Dow Canada operates and maintains all of its facilities entirely within the territory of Canada. Under the principles of international law, Dow Canada is not subject to the jurisdiction or orders of this Court insofar as the proposed litigation is concerned.

Dow U. S. is not responsible for the alleged wrongful acts of Dow Canada arising as a result of Dow Canada's operation of its Sarnia plant. Dow Canada is a separate business entity, run by its own management. It is solely responsible for its own acts. It is not a mere agent or facility of Dow U. S.

Ownership of the stock of a subsidiary does not make the stockholder liable for the acts of its subsidiary.

The *Report to the International Joint Commission on the Pollution of Lake Erie, Lake Ontario and the International Section of the St. Lawrence River*, Vol. 1 (Summary) and Vol. 2 (Lake Erie) (1969), leads to the conclusion that water pollution problems are complex and consequently require an intimate familiarity with scientific and economic facts.

The relief sought by Ohio is either clearly unwarranted or so difficult to effectuate as to make an adjudicative proceeding by this Court inappropriate.

An alternative tribunal to investigate and supervise pollution problems involving Lake Erie has been activated and is functioning under authority of the Treaty.

A prohibitory injunction by this Court pertaining to the operation of Dow Canada's plant in Sarnia, Ontario would be improper and ineffective because the plant's operation is being continuously regulated under orders by the Canadian government.

A judgment for damages would be unprecedented and practically impossible to measure because of the involved complexities of pollution, both as to source and content.

Ohio's prayer for mandatory relief requiring removal of all of the mercury or compounds thereof presently in Lake Erie would embroil this Court in a scientific and administrative morass where professional opinion is sharply divided as to the appropriate course to be followed.

Because an adjudication of the problems of pollution raised in the proposed litigation by this Court, at this time, could not anticipate all of the probable and complex future changes in circumstances, general knowledge, environment, ecology or advances in scientific, engineering and technical knowledge and techniques, this Court should decline jurisdiction and dismiss the action filed by Ohio.

ARGUMENT.

I. DOES THE COURT LACK JURISDICTION BECAUSE OF THE PROVISIONS OF THE BOUNDARY WATERS TREATY, 1909, BETWEEN THE UNITED STATES AND GREAT BRITAIN, PROCLAIMED MAY 13, 1910, 36 STAT. 2448; TS 548 AND THE PRINCIPLES OF INTERNATIONAL LAW?

A. The Subject Matter of the Proposed Complaint.

Ohio's proposed Complaint characterizes the subject matter of the litigation as sounding in negligence and nuisance. Contrary to Ohio's position, it is submitted the subject matter is the alleged pollution of Lake Erie, *an international water basin*, by Dow Canada, a Canadian corporation in Canada and Wyandotte, a Michigan corporation in Michigan. Therefore, since Lake Erie is an international water basin, it is a natural resource of the United States government and the Dominion of Canada.

After difficult and prolonged negotiations, Great Britain and the United States entered into the Boundary Waters Treaty of 1909. By Article IV of the Treaty, the parties agreed that the international boundary waters "shall not be polluted on either side to the injury of health or property on the other." Article VII created the International Joint Commission, consisting of six members. Article X of the Treaty provides, in part, for the reference by Canada or the United States to the International Joint

Commission, by the consent of the two sovereigns, of "Any questions or matters of difference arising between the High Contracting Parties involving the rights, obligations, or interests of the United States or of the Dominion of Canada either in relation to each other or to their respective inhabitants, * * * A majority of the said Commission shall have power to render a decision or finding upon any of the questions or matters so referred." The Treaty and the Rules of Procedure adopted thereunder provide the means whereby any problem about the rights or interests of either state, including its inhabitants, along the common frontier may be submitted to the Commission.

Boundary waters are defined in the Treaty's Preliminary Article to include "the waters from main shore to main shore of the lakes * * * along which the international boundary between the United States and the Dominion of Canada passes", thus including all of Lake Erie.

Article VI, Clause 2 of the Constitution declares that treaties shall be the supreme law of the land.

Article I, Section 10 specifically sets out the intention of the framers of the Constitution to leave treaty power solely in the hands of the federal government.

The Treaty References provide that the International Joint Commission shall consider all the pollution problems of Lake Erie. Thus, since the two sovereign powers have agreed to resolve all international water pollution problems under the provisions of the Treaty, the proposed Complaint sought to be filed by Ohio is legally insufficient to give this Court jurisdiction.

In the case of *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796) Mr. Justice Chase said,

"If doubts could exist before the establishment of the present national government, they must be *entirely*

removed by the 6th Article of the constitution, which provides 'that all treaties made, or which shall be made, under authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding. (*The Federalist*, LXXV, p. 2.)"

* * * * *

"Four things are apparent on a view of this 6th article of the national constitution. 1st. That it is retrospective, and is to be considered in the same light as if the constitution had been established before the making of the treaty of 1783. 2d. *That the constitution, or laws, of any of the States, so far as either of them shall be found contrary to that treaty, are, by force of the said article, prostrated before the treaty.* 3d. That consequently the treaty of 1783 has superior power to the legislature of any State, because no legislature of any State has any kind of power over the constitution, which was its creator. 4th. *That it is the declared duty of the state judges to determine any constitution, or laws of any State, contrary to that treaty, made under the authority of the United States, null and void. National or federal judges are bound by duty and oath to the same conduct.*" 3 U.S. (3 Dall.) at 336-337. (Emphasis supplied.) See also, *Missouri v. Holland*, 252 U.S. 416, 432 (1920); *First Iowa Hydro-Electric Co-op v. F.P.C.*, 328 U.S. 152 (1946) and *Sanitary District of Chicago v. United States*, 226 U.S. 405 at 425-426 (1925).

And, as this Court has noted on numerous occasions, "Treaties are to be liberally construed so as to effect the apparent intention of the parties." *Neilson v. Johnson*, 279 U.S. 47 at 51 (1929), citing *Jordan v. Tashiro*, 278 U.S. 123; *Geofray v. Riggs*, 133 U.S. 258, *In re Ross*, 140 U.S. 453, *Tucker v. Alexandroff*, 183 U.S. 424.

Since the Treaty of 1909 deals with the utilization and pollution of the international waters of the Lake Erie

Basin, it is proper to state that the rights, responsibilities and liabilities arising from the use or results of the use of the waters or the pollution thereof must be decided under the principles of international law before an international tribunal or commission, such as the International Joint Commission.

In fact, the International Joint Commission is presently examining the problems of the pollution of the boundary waters in depth under Articles IV and IX of the Treaty.

The United States and Canada have made three specific References to the Commission—August 2, 1912, April 1, 1946 and October 7, 1964—to investigate and report on the problems of pollution of the international boundary waters.

The *Report of the International Joint Commission (United States and Canada) on the Pollution of Boundary Waters* (1951) contains the following significant comments:

"The data presented in chapter IX have shown clearly that there is a transboundary crossing, both of currents and pollution, from each side to the other. Since waste discharges tend to diffuse and become diluted with the receiving waters, it is difficult to trace a specific effluent over the distance required to dissipate its potency. Added dilution through travel downstream and the admixture of similar or other deleterious materials further complicate this difficulty. The intermingling is also influenced by winds, bends in the river, islands or other obstructions, and navigation channels. These effects may not be constant. Under these circumstances it is not feasible to state, in exact terms, the amount of pollution which crosses from each country to the other."

Page 166—*The Report of the International Joint Commission* (1951).

The above Report was followed on September 2, 1969 by the *Report of the International Lake Erie Water Pollution Board to the International Joint Commission* wherein the following conclusions are noted:

"Transboundary Pollution

The Advisory Boards have concluded from flow studies conducted by United States and Canadian agencies, *that there is substantial mixing of waters in the lakes to the extent that concentration levels of polluting materials are remarkably uniform throughout extensive areas of each lake. Thus, there appears to be no doubt that all major sources of pollution to the lakes have contributed directly, or indirectly, to their generally degraded condition."*

Report to the International Joint Commission, Vol. I (Summary) at 7 (1969) (emphasis added).

The following specific sources of pollution are identified:

"1. the major contribution of many polluting materials to Lake Erie arises from the Detroit River, which receives very large quantities of pollutants from the heavily industrialized Detroit metropolitan area, and partially treated sewage from the City of Windsor, Ontario."

Report to the International Joint Commission. Id. at 8 (Emphasis added).

The *Trail Smelter* case is a classic example of a tribunal empowered by a special convention concluded between the United States and Canada considering the problem of state responsibility for extra-territorial injury.

A claim was brought by the United States against Canada under a special convention between the parties arising out of the operation of a smelter by a private corporation in Trail, British Columbia. The operation of the

smelter resulted in the discharge of sulphur dioxide causing injury to property in the State of Washington. Under the convention, the Dominion of Canada assumed international responsibility for the damage relating to the private corporation's activity within Canadian territory. The tribunal, among other holdings, held that: "Considering the circumstances of the case, the tribunal holds that the Dominion of Canada is responsible in international law for the conduct of the Trail Smelter." *The Trail Smelter Arbitral Decision* (United States v. Canada), 35 AM. J. INT'L L. 684 at 716-717 (1939); 3 INT'L ARB. AWARDS 1905 at 1963 (1949). See generally, Read, *The Trail Smelter Dispute*, 1 CAN. YB. INT'L. 213 (1963).

By reason of the holding in the above analogous situation, any legal action sought to be initiated by Ohio affecting the international boundary waters and waters flowing across the international boundary between Canada and the United States or into the boundary waters cannot be maintained under the principles of international law.

Therefore, since the United States and Canada have, by the Treaty designated the International Joint Commission as the administrative body to investigate the pollution problems involving the international boundary waters (See International Joint Commission Dockets Nos. 4, 53 and 55) the only parties in interest in the proposed litigation are Canada and the United States.

In the treatise, *The Law of International Drainage Basins*, the following conclusions are reached:

"In this complex situation, a regulatory rather than an adjudicative process may be appropriate. An international administrative agency with the power of continuing discretion would have sufficient flexibility to cope with such problems. In some cases an adjudicatory process may not be able to provide suitable remedies, even if responsibility in legal terms

could adequately be assessed. 'A man dying of thirst cannot be revived with monetary compensation for his water, even when tendered in advance.' And similarly, it is doubtful whether injunctive relief could provide sufficient flexibility. For these reasons many publicists have advocated the establishment of regional commissions to control the use of international river basins.

"The International Joint Commission's work in regulating the United States and Canada boundary waters is an excellent example of the value of such administrative machinery. It should, however, be recognized that general relations between these two countries have been unusually harmonious. United States interstate compacts and the entire trend of municipal law in technologically developed states towards administrative regulation, provide further evidence of the necessity for the exercise of continued discretion in controlling complex uses of natural resources."

The Law of International Drainage Basins—Edited by A. H. Garretson, R. D. Hayton and C. J. Olmstead for The Institute of International Law, at 110 (Emphasis supplied).

Citing, Laylin and Bianchi, *The Role of Adjudication in International River Disputes*, 53 AM. J. INT'L L. 30, 31 (1959);

International Law Association Committee Report to Tokyo Conference (1964) 31; and

Forer, *Water Supply; Suggested Federal Regulation*, 75 HARV. L. REV. 332, 347-349 (1961).

And, finally, as so aptly written by Alexander Hamilton in the *Federalist*, No. LXXX:

"* * * the peace of the whole ought not to be left at the disposal of a part. The union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought

ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, is with reason classed among the just causes of war, it will follow, that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith, than to the security of the public tranquillity. A distinction may perhaps be imagined, between cases arising upon treaties and the laws of nations, and those which may stand merely on the footing of the municipal law. The former kind may be supposed proper for the federal jurisdiction; the latter for that of the states. But it is at least problematical, whether an unjust sentence against a foreigner where the subject of controversy was wholly relative to the *lex loci*, would not, if unredressed, be an aggression upon his sovereign, as well as one which violated the stipulations of a treaty, or the general law of nations. And a still greater objection to the distinction would result from the immense difficulty, if not impossibility, of a practical discrimination between the cases of one complexion and those of the other. So great a proportion of the controversies in which foreigners are parties involve national questions, that it is by far most safe and most expedient, to refer all those in which they are concerned to the national tribunals.

The Federalist, New Edition (1942), Hamilton, Madison & Jay (1788) at 365. (Emphasis added.)

Thus, since the subject matter of Ohio's proposed Complaint is being investigated by the International Joint Commission under the Treaty provisions agreed upon through sensitive, diplomatic discussions between the United States and Canada, this Court does not have jurisdiction over the subject matter. See *The Schooner Exchange vs. McFaddon*, 11 U.S. (7 Cranch) 116 (1812).

Litigation, such as proposed by Ohio, should be negotiated by the cooperative action of the United States and Canada under the provisions of the Treaty and not by court action.

II. DO THE ALLEGATIONS SET OUT IN THE PROPOSED COMPLAINT SOUGHT TO BE FILED BY THE STATE OF OHIO CREATE A CAUSE OF ACTION IN FAVOR OF THE STATE OF OHIO UNDER ARTICLE III, SECTION 2, CLAUSE 2 OF THE CONSTITUTION OF THE UNITED STATES AND TITLE 28 U.S.C., SECTION 1251?

A. The State of Ohio Does Not Have a Cause of Action Under Ohio Revised Code, Section 123.03.

In the proposed Complaint, Ohio asserts the defendants have violated the "statutes of Ohio" and that the conduct of the defendants constitutes a public nuisance.

OHIO REVISED CODE, Section 123.03, provides that the waters of Lake Erie consisting of the territory within the boundaries of Ohio to the international boundary line between the United States and Canada, including the soil beneath and their contents, belong to Ohio as proprietor in trust for the people of the state, "* * * subject to the powers of the United States government. * * *"

The above enacted legislation does not give Ohio a cause of action insofar as the proposed litigation herein is concerned.

Ohio asserts Section 123.03, OHIO REVISED CODE in an attempt to invoke the *parens patriae* concept discussed by this Court in *Missouri vs. Illinois*, 180 U.S. 208 (1901), together with the rule of constitutional law which declares that quasi-sovereign states possess dominion over the beds of all navigable streams within their borders. See *Pollard vs. Hagan*, 44 U.S. (3 How.) 212 (1845).

The enabling clauses set forth in Section 123.03 OHIO REVISED CODE are "** * * subject to the powers of the United States government * * **". Therefore, since the proposed litigation concerns itself with the alleged pollution of Lake Erie, an international water basin, the ultimate interest of the United States in Lake Erie is stronger and more comprehensive (extra-territorial) than is Ohio's individual, territorial (internal) interest. *The interests of the nation are more important than those of Ohio.*

Therefore, it is submitted Ohio cannot assert any state-created rights or litigate the subject matter of the proposed Complaint because:

(1) The Treaty 1909 is the supreme law of the land (U. S. Constitution, Art. VI) and, as such, is binding upon Ohio insofar as any problems involving the pollution of the international boundary waters are concerned.

Article IV of the Treaty clearly intends that each sovereign makes itself responsible for all pollution originating on its own side of the boundary line which causes injury to the health or property on the other side of the boundary line. A duty is imposed upon each sovereign to prevent its *own* inhabitants from causing injury by pollution on the other side of the boundary line. Thus, Article IV of the Treaty restates the generally recognized rule of international law which imposes a duty upon a sovereign to prevent its own subjects, within its own territory, from committing injurious acts against another state. L. Oppenheim, 1 INTERNATIONAL LAW, at 330 (7th Ed., Lauterpacht 1948).

It is well settled that, when the federal government, by statute or treaty, legislates in any area, the application of a state law which in any manner obstructs or impedes the accomplishment and execution of the federal purpose is not permitted. *Pennsylvania v. Nelson*, 350 U.S. 497

(1956); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). This result is mandated by Article VI of the Constitution which declares the Constitution, federal laws and all treaties to be the supreme law of the land.

(2) Section 123.03, OHIO REVISED CODE and any other legislation enacted by Ohio cannot have any extra-territorial effect upon Dow Canada's use or the results of its use of the St. Clair River on the Canadian side.

OHIO REVISED CODE, Section 123.03 does not set forth any rule of law governing conduct nor does it purport to establish a justiciable right on behalf of anyone.

Accordingly, the reference to Section 123.03, OHIO REVISED CODE in the proposed Complaint does not establish or create a cause of action in favor of Ohio insofar as the issues here are concerned.

B. The State of Ohio Does Not Have a Cause of Action Under Federal Law.

The Clean Water Restoration Act of 1966 [Act of November 3, 1966, Section 206, 80 Stat. 1250, amending 33 U.S.C., Section 466 G (Supp. I, 1965)] does not give any right to Ohio under federal law in connection with the proposed litigation. The *provisions* of the Act of 1966 extending federal enforcement authority to international pollution *are limited solely to controlling the conduct of the citizens and inhabitants of the United States within the territory of the United States*. The legislation does not have any extra-territorial application upon the conduct of Dow Canada, an alien, in connection with its operation of its plant in the territory of Ontario, Canada or its use or the results of its use of the Canadian portion of the St. Clair River.

The Act of 1966 specifically provides in paragraph 466 G (d) (2) that “* * * *Nothing in this paragraph*

*should be construed to modify, amend, repeal, or otherwise affect the provisions of the 1909 Boundary Waters Treaty between Canada and the United States * * ** (Emphasis supplied.)

In order to underline the intent of Congress in enacting the Clean Water Restoration Act, statements made by Murray Stein, Chief Enforcement Officer of the Federal Water Pollution Administration of the Department of Interior, to explain the proposed administration bill, S. 2987, and by Senator Muskie indicate the proposed litigation urged by Ohio is clearly an international problem, in that they said:

"Mr. Stein. The waters shared by the United States and Canada, and by the United States and Mexico, comprise a kind of no man's land in rapid, effective water pollution abatement. The administration bill reflects concern at this kind of situation, wherein pollution originating in one of our States may be impairing the health or welfare of persons in one of our neighboring countries. Although representations may be made through our Department of State, there is no mechanism for requiring the State to take the necessary action." Hearings on S. 2987, Senate Doc. 2947, 89th Congress, 2nd Sess. 435 at 436 (1966). (Emphasis supplied.)

* * * * *

*"Senator Muskie. * * * If there is a contribution to the pollution problem on both sides of the international stream, it is only fair and reasonable to suggest that the action should be international and not simply unilateral."* *Id.* at 440 (Emphasis supplied.)

* * * * *

"Senator Muskie. I think what we need is an initiative on both sides. If we could have it from our side, then we would be in a better position to go to

the other side and say, "We are ready. When are you going to be?"

Mr. Stein. Yes, sir.

The Secretary would act whenever he has reason to believe that such pollution, originating in our country and endangering the health or welfare of persons in a foreign country, is occurring, and the Secretary of State requests that he take such action. *This proposed authority is consistent with the treaty obligations in boundary waters and would assist in implementing our responsibilities under these agreements.*" *Id.* at 440. (Emphasis supplied.)

Hearings on S. 2987, Senate Doc. 2947, 89th Cong., 2nd Sess. 435 (1966).

C. Ohio's Proposed Complaint Does Not State a Cause of Action Under Federal Common Law.

Ohio has alleged the conduct of the defendants constitutes a public nuisance and prays for injunctive relief. Ohio apparently seeks to rely upon a federal common law applicable to suits brought by states in their quasi-sovereign capacity. *Such suits may not be brought by a state to abate a nuisance originating in a foreign nation.*

It is clear Ohio's proposed Complaint deals with a problem which is completely extra-territorial and not internal or domestic insofar as Dow Canada is concerned.

Thus, when an extra-territorial issue is raised, only the federal government has inherent power to negotiate such an issue. The federal government's complete power over foreign affairs makes it imperative that the interests of sovereignty be favored. See *United States vs. California*, 332 U.S. 19 (1947).

Therefore, the United States government—not the State of Ohio—is *parens patriae* for all of the citizens of the State of Ohio. See *Massachusetts vs. Mellon*, 262 U.S. 447 (1923).

When a claimed nuisance sought to be enjoined originates, not in a sister state, but in a foreign nation, a state (Ohio) cannot initiate litigation seeking an adjudication of the issue. Under international law, a state (Ohio) does not possess the attributes of international sovereignty under the Constitution.

This Court has stated in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 at 316 (1936):

"[T]he states severally never possessed international powers * * * During the colonial period, those powers were possessed exclusively by and were entirely under the control of the Crown * * * As a result of the separation from Great Britain by the colonies acting as a unit, *the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America.*" (Emphasis supplied.)

The *parens patriae* cases upon which Ohio relies are not in point because they deal solely with one State's remedy against another or citizens of another. Such cases provide no basis for a suit seeking relief against an alleged nuisance originating in Canada.

D. The State of Ohio Does Not Have a Cause of Action Under the Treaty 1909.

The United States is empowered to exercise its sovereign authority over the use or results of the use of the international boundary waters and can pre-empt Ohio's proposed litigation by virtue of the Treaty 1909. Since the United States has assumed national responsibilities with respect to the pollution of the international boundary waters, the United States can act, in this instance, to prevent Ohio's intended interference with the intentions and obligations of the United States, as set forth in the Treaty.

As pointed out by Trelease in *Federal Limitations on State Water Law*, 10 BUFF. L. REV. 399, at 415 (1961):

“[A]ny state water law that appeared to authorize a use proscribed by the treaty would have to yield, and such a use could not be initiated, or could not be allowed to continue, though the law stood on the books as applicable to other waters.” See *Sanitary District of Chicago vs. United States*, 266 U.S. 405 (1925); 4 A.L.R. 1377 (1915); 17 A.L.R. 635 (1922) and 134 A.L.R. 882 (1941).

The References of August 2, 1912, April 1, 1946 and October 7, 1964, referred to hereinabove, by Canada and the United States to the International Joint Commission clearly demonstrate the two sovereign powers have concluded all problems of pollution of the international boundary waters are international in scope. Accordingly, Ohio, under principles of international law, as a quasi-sovereign, has no right to be heard or to invoke the jurisdiction of this Court.

Since pollution of the international waters of the Lake Erie Basin has been determined to be an international problem, not a domestic one, all solutions have to flow from the results of amicable negotiations between the United States and Canada or from a Reference to the International Joint Commission. The landmark case of *United States vs. Pink*, 315 U.S. 203 (1942) is controlling and decisive. In delivering the opinion of the Court, Mr. Justice Douglas said:

“All constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature, * * *’ The Federalist, No. 64. A treaty is a ‘Law of the Land’ under the supremacy clause (Art. VI, Cl. 2) of the Constitution. Such international compacts and agreements as the Litvinov

Assignment have a similar dignity. *United States v. Belmont*, *supra*, 301 U.S. at p. 331. See Corwin, *The President, Office & Powers* (1940), pp. 228-240." *Id.* at 230.

* * * * *

"But state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement. See *Nielsen v. Johnson*, 279 U.S. 47. Then, the power of a State to refuse enforcement of rights based on foreign law which runs counter to the public policy of the forum (*Griffin v. McCoach*, 313 U.S. 498, 506) must give way before the superior Federal policy evidenced by a treaty or international compact or agreement. *Santovincenzo v. Egan*, *supra*, 284 U.S. 30; *United States v. Belmont*, *supra*." *Id.* at 230-231. (Emphasis added.)

* * * * *

"We recently stated in *Hines v. Davidowitz*, 312 U.S. 52, 68, that the field which affects international relations is 'the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority'; and that any state power which may exist 'is restricted to the narrowest of limits.' * * * Here, we are dealing with an exclusive federal function. If state laws and policies did not yield before the exercise of the external powers of the United States, then our foreign policy might be thwarted. These are delicate matters. If state action could defeat or alter our foreign policy, serious consequences might ensue. The nation as a whole would be held to answer if a State created difficulties with a foreign power. Cf. *Chy Lung v. Freeman*, 92 U.S. 275, 279-280. Certainly, the conditions for 'enduring friendship' between the nations, which the policy of recognition in this instance was designed to effectuate, are not likely to flourish where, contrary to national policy, a lingering atmosphere of hostility is created by state action.

Such considerations underlie the principle of *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302-303, that when a revolutionary government is recognized as a *de jure* government, 'such recognition is retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence.' They also explain the rule expressed in *Underhill v. Hernandez*, 168 U.S. 250, 252, that 'the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.' *Id.* at 232-233 (Emphasis added.)

* * * * *

"We repeat that there are limitations on the sovereignty of the States. No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively. It need not be so exercised as to conform to state laws or state policies, whether they be expressed in constitutions, statutes, or judicial decrees. And the policies of the States become wholly irrelevant to judicial inquiry when the United States, acting within its constitutional sphere, seeks enforcement of its foreign policy in the courts. For such reasons, Mr. Justice Sutherland stated in *United States v. Belmont*, *supra*, 301 U.S. at p. 331, 'In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist.' *Id.* at 233-234. (Emphasis added.)

The principles set forth in *United States v. Pink* have been fortified by the following statement from a speech delivered in New York City on April 25, 1970 by William P. Rogers, United States Secretary of State, when he was Attorney General of the United States and said:

"This administration is committed to strengthening the role of international adjudication in the settlement of international disputes. We are taking specific steps to carry out this policy.

In the future, the Department of State will examine every treaty we negotiate with a view to accepting, wherever appropriate, the jurisdiction of the International Court of Justice with respect to disputes arising under the treaty. In a treaty in which we or the other government cannot accept the Court's jurisdiction, we will urge the inclusion of other appropriate dispute settlement provisions.

In addition, wherever disputes arise with other countries, we give active and favorable consideration to the possibility of submitting them to the International Court of Justice. Recently, we asked the Canadian Government to join us in submitting to the Court the differences arising from Canada's intention to establish pollution and exclusive fisheries zones more than 12 miles from her coast."

17 FEDERAL BAR NEWS, June, 1970, No. 6 at 161.

III. BECAUSE OF THE COMPLEX INTERNATIONAL PROBLEMS INVOLVED, CAN THE COURT DECLINE JURISDICTION AND REFUSE TO IMPOSE JUDICIAL DECISIONS UPON THE PARTIES SOUGHT TO BE MADE DEFENDANTS IN THE PROPOSED LITIGATION?

A. This Court Should Decline to Exercise Jurisdiction Over the Subject Matter of the Proposed Litigation.

As has been pointed out, the real parties in interest, Canada and the United States, have undertaken to work out a solution of all of the problems of pollution which have developed in the Lake Erie Basin, an international boundary waterway. Under such circumstances, the theory of sovereign immunity prevails and this Court

should decline jurisdiction. *The Schooner Exchange vs. McFaddon*, 11 U.S. (7 Cranch) 116 (1812).

The general pollution of the Lake Erie Basin has been declared to be a source of international concern. The decision to refer the matter to the International Joint Commission does not bring the subject matter of the proposed litigation sought by Ohio within Article III, Section 2 of the Constitution and 28 U.S.C. 1251 wherein cases or controversies over which this Court will take jurisdiction are enumerated.

In view of the affirmative actions of the sovereign powers (Canada and the United States), the decisions to refer the pollution problem to the International Joint Commission reached by the sovereigns should prevail; and this Court should decline to exercise jurisdiction over the subject matter of the proposed Complaint here involved.

In support, this Court has made the following pronouncements:

[It is necessary to exercise] "a sound discretion in order to protect this Court from an abuse of the opportunity to resort to its original jurisdiction * * *" *Massachusetts v. Missouri*, 308 U.S. 1, 19 (1939). Also, as Mr. Justice Douglas stated in *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 at 464 (1945):

"It does not necessarily follow that this Court must exercise its original jurisdiction. It has at times been held that this Court is not the appropriate tribunal in which to maintain suits brought by a State."

B. The Proposed Complaint Submitted by Ohio Fails to State a Cause of Action Against Dow U. S.

In the proposed Complaint, Ohio alleges Dow U. S. is "responsible along with" Dow Canada for mercury or compounds thereof allegedly discharged by Dow Canada into Canadian international boundary waters because Dow U. S. owns all of the outstanding shares of Dow Canada stock "and therefore controls" Dow Canada.

It is well settled that neither stock control nor common directors and officers are sufficient to hold a stockholder liable for acts of its subsidiary. *Steven v. Roscoe Turner Aeronautical Corp.*, 324 F.2d 157 at 161 (7th Cir. 1963); *Spears v. Transcontinental Bus System*, 226 F.2d 94 at 98 (9th Cir. 1955), cert. denied, 350 U.S. 950 (1956); *Owl Fumigating Corp. v. Calif. Cyanide Co.*, 24 F.2d 718, at 719 (Del. 1928), aff'd, 30 F.2d 812 (3d Cir. 1929). "Control through the ownership of shares does not fuse the corporations, even when the directors are common to each." *Kingston Dry Dock Co. v. Lake Champlain Transportation Co.*, 31 F.2d 265, 267 (2d Cir. 1929).

As this Court has pointed out, "As a general rule a corporation and its stockholders are deemed separate entities * * *". *New Colonial Ice Co. v. Helvering*, 292 U.S. 435 at 442 (1934). Separate corporate entities are not to be disregarded unless "ownership of stock is resorted to, not for the purpose of participating in the affairs of the corporation in which it is held in a manner normal and usual with stockholders, but for the purpose of making (the subsidiary) a mere agent, or instrumentality or department of another company * * *". *U.S. v. Reading Co.*, 253 U.S. 26 at 62-63 (1920).

Also, the Sixth Circuit Court of Appeals has held:

"[I]t is likewise well settled that a corporation is ordinarily an entity, separate and apart from its stockholders, and mere ownership of all the stock of one corporation by another, and the identity of officers of one with officers of another, are not alone sufficient to create identity of corporate interest between the two companies or to create the relation of principal and agent or to create a representative or fiduciary relationship between the two."

* * * * *

"The extent of stock ownership and mere potential control of one company over another has never been regarded as the determining factor in the consideration of such cases. Something must be disclosed to indicate the exercise of undue domination or influence resulting in an infringement upon the rights of the subservient corporation for the benefit of the dominant one."

Kentucky Electric Power Co. v. Norton Coal Mining Co., 93 F.2d 923 at 926 (6th Cir. 1938), cited with approval in

Garrett v. Southern Railway Co., 278 F.2d 424 at 425 (6th Cir.), cert. denied, 364 U.S. 833 (1960).

Similarly, in *Lowendahl v. Baltimore & O. R. Co.*, 247 App. Div. 144, 287 N.Y.S. 62 at 72-76 (1st Dep't 1936), aff'd, 272 N.Y. 360, 6 N.E.2d 56 (1936), it was held:

"Control through mere ownership of a majority or of even all the capital stock and the use of the power incident thereto to elect officers and directors will not in and of itself predicate liability * * * Liability must depend upon a domination and control so complete that the corporation may be said to have no will,

mind, or existence of its own, and to be operated as a mere department of the business of the stockholder."

Therefore, Ohio's allegations relative to stock ownership and "control" by Dow U. S. do not make Dow U. S. liable for Dow Canada's acts; and Ohio's proposed litigation should be dismissed as to Dow U. S.

C. This Court Does Not Have Jurisdiction Over the Person of Dow Canada.

If this Court should order that a Summons be issued for service upon Dow Canada, under the circumstances of the proposed litigation, this Court would be engaging in judicial aggression against a Canadian corporation. This action would interfere with the course of conduct heretofore evidenced by the United States under the provisions of the Treaty. Such aggression by this Court would infringe upon the sovereignty of the Dominion of Canada and its right to deal with Dow Canada for any acts of Dow Canada initiated entirely within Canada.

By virtue of the Treaty and the acts of the sovereign powers (United States and Canada), this Court does not have jurisdiction over the person of the defendant, Dow Canada, for the purpose of adjudicating any of the issues involved in the proposed litigation insofar as Dow Canada's alleged affirmative acts are concerned.

Further, this Court is not authorized, under either Rule 9 (8) of the RULES OF THE SUPREME COURT or, if applicable, the FEDERAL RULES OF CIVIL PROCEDURE, Rule 4 (E), which authorizes the use of the Ohio State long-arm statutes, to have Summons issue out of this Court to be served upon the defendant, Dow Canada, in the Dominion of Canada.

D. Since the Field of Water Development and Pollution Is Fraught With Complexities, This Court Can Dismiss the Proposed Litigation Because the Treaty 1909 Provides an Alternative Forum.

The *parens patriae* aspect of Ohio's request to litigate the complex and technical problems involving the pollution of the international boundary waters of Lake Erie immediately suggests difficult questions involving degree of alleged injury and damage and the number of persons involved. Ohio is duty-bound to show the claimed injuries and damages to be either actual or imminent, rather than speculative. Further, Ohio, if allowed to litigate, must show by clear and convincing evidence that the injuries and damages are of serious magnitude.

In considering the problems of proof, how can allowance be made for the fact that the waters of the Lake Erie Basin are in constant motion across state and international boundary lines, as are the fish swimming back and forth across these borders? Further, how can it be decided which of the transient fish or wildlife actually "belong" to Ohio or to Canada?

It is highly unlikely Ohio can prove any of the alleged mercury contamination existing in that portion of Lake Erie "owned" by Ohio is attributable to any of the discharges of metallic mercury from the Dow Canada plant located on the St. Clair River in Sarnia, Ontario, approximately 90 miles away.

The situation is similar to that before this Court in *Missouri v. Illinois*, 180 U.S. 208 (1901), 200 U.S. 496 (1905), where the request of the state of Missouri for an injunction against the discharge of sewage by the state of Illinois was dismissed on the ground that Missouri had not proved the alleged pollution resulted from the discharges in question.

In short, in the current state of scientific knowledge and because of the great number of interacting causes, there is no accurate or fair way of determining specific individual or joint liability or assessing damages, even if damage could be proved.

As pointed out in *Missouri v. Illinois*, the existence of other polluters, both within and without the plaintiff state "makes the case weaker in principle as well as harder to prove than one in which all came from a single source." 200 U.S. at 526.

This Court has previously said that in an original suit, unlike a case on appellate review, "even when the case is first referred to a master, this Court has the duty of making an independent examination of the evidence, a time-consuming process * * *". *Georgia v. Penna. R. R.*, 324 U.S. 439 at 470 (1945). Such cases "consume a disproportionate amount of the Court's time." Note, *The Original Jurisdiction of the United States Supreme Court*, 11 STAN. L.R. 665 at 695 (1959), giving examples of time consumed in specific original jurisdiction cases.

In the *Report to the International Joint Commission on the Pollution of Lake Erie, Lake Ontario and the International Section of the St. Lawrence River*, Volume 1 (Summary) (1969), the following is noted:

Transboundary Pollution

The Advisory Boards conclude, on the basis of data and other information developed by the United States and Canada over the last six years, that Lake Erie, Lake Ontario and the international section of the St. Lawrence River are being polluted on both sides of the boundary (United States-Canada) to an extent that is causing and is likely to cause injury to health and property on the other side of the boundary.

The Advisory Boards have concluded from flow studies conducted by United States and Canadian

agencies, that there is substantial mixing of waters in the lakes to the extent that concentration levels of polluting materials are remarkably uniform throughout extensive areas of each lake. *Thus, there appears to be no doubt that all major sources of pollution to the lakes have contributed directly, or indirectly, to their generally degraded condition.* *Id.* at 7 (Emphasis added.)

Based upon the foregoing, it is obvious:

(1) There are multiple causes and effects of pollution. Pollution problems are complex and demanding of scientific investigation, all of which will require an intimate familiarity with all of the pertinent scientific, ecologic and economic facts involved; and

(2) It is apparent the two sovereigns (Canada and the United States) have not fully investigated or been completely informed about the alleged mercury pollution problem because the aforementioned Advisory Board Report contains nothing therein about mercury contamination.

Since the issues involved in the proposed litigation are so complex and diplomatically delicate, we invite this Court's attention to what it has said in previous cases concerning similar prolonged and complex issues:

In *Colorado vs. Kansas*, 320 U.S. 383 at 392 (1943), this Court clearly stated its disinclination to decide such cases:

"The reason for judicial caution in adjudicating the relative rights of States in such cases is that, while we have jurisdiction of such disputes, *they involve the interests of quasi-sovereigns, present complicated and delicate questions, and, due to the possibility of future change of conditions, necessitate expert administration rather than judicial imposition of a hard and fast rule.* Such controversies may appropriately be composed by negotiation and agreement, pursuant to

the compact clause of the federal Constitution. We say of this case, as the court has said of interstate differences of like nature, that such mutual accommodation and agreement should, if possible, be the medium of settlement, instead of invocation of our adjudicatory power." (Emphasis added.)

See also, *New York vs. New Jersey*, 256 U.S. 296 (1921) and *North Dakota vs. Minnesota*, 263 U.S. 365 at 385-386 (1923).

In a complex situation such as is here presented, in which there are multiple causes and effects of pollution, many of which are constantly changing, a regulatory and continuing supervisory solution of the problem is dictated rather than securing a current, unyielding and transient adjudication by this Court.

Finally, the International Joint Commission, as an alternate tribunal, has proved it is well-equipped to handle the alleged pollution problem Ohio seeks to litigate. See Waite, *The International Joint Commission—Its Impact on Land Use*, 13 BUFF. L. REV. 93 (1963-4). And, the International Joint Commission has also demonstrated that with its power of continuing supervision it has sufficient flexibility to safely control this complex problem now and in the future.

For all of the reasons stated above, this Court should decline to exercise its jurisdiction and should dismiss Ohio's Motion.

CONCLUSION.

Dow U. S. respectfully submits Ohio's Motion for Leave to file Complaint should be denied and dismissed for the following reasons:

1. The two sovereign nations, United States and Canada, have unequivocally evidenced their vital interest and great concern about the problem of the pollution of the

international boundary waters between the United States and Canada, which include Lake Erie and tributaries thereto.

The United States and Canada have, by References to the International Joint Commission, exercised their sovereign rights to have all problems involving the pollution of the international boundary waters, including Lake Erie, investigated and supervised under the provisions of the Boundary Waters Treaty 1909.

Since pollution of the Lake Erie Basin has been determined to be an international problem, Ohio must yield to the decisions heretofore agreed upon between the United States and Canada.

Superior federal policy has determined the problem of pollution of the international boundary waters between the United States and Canada will be considered through amicable diplomatic international negotiations or References to the International Joint Commission under Article IX of the Treaty 1909. In support see *United States v. Pink*, 315 U.S. 203 (1942); *Neilson v. Johnson*, 279 U.S. 47 (1929); *Santovincenzo v. Egan*, 284 U.S. 30 (1931); *United States v. Belmont*, 301 U.S. 324 (1937); *Hines v. Davidowitz*, 312 U.S. 52 (1941); *Chy Lung v. Freeman*, 92 U.S. 275 (1875); and References to the International Joint Commission (Dockets 4, 53 and 55), April 1, 1946, April 2, 1948 and October 7, 1964.

Therefore, since the United States-Canada international boundary waters pollution problem involves external affairs and foreign policy, this Court has no jurisdiction to adjudicate the issues raised in the proposed litigation sought by Ohio.

2. Ohio does not have any legal right to intervene as a party plaintiff in problems involving the pollution of the international boundary waters between the United States and Canada, because:

a. Ohio cannot assert any state-created rights.

b. Section 123.03, OHIO REVISED CODE cannot have any extra-territorial effect upon Dow Canada's use or results of its use of the St. Clair River on the Canadian side.

c. Ohio, a quasi-sovereign, cannot intervene as a litigant in an area involving international law which has been pre-empted by the two sovereign powers, United States and Canada.

d. Ohio has no right to litigate issues involving the problem of pollution of the international boundary waters since the two sovereign powers, United States and Canada, have invoked the provisions of the Treaty 1909 for the purpose of investigating and supervising this problem. See *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304 at 316 (1936).

3. Insofar as Dow U. S. is allegedly involved, neither stock control, common directors nor officers are sufficient to hold Dow U. S. liable for any acts of Dow Canada in connection with the operation of Dow Canada's plant in Ontario, Canada. *U. S. v. Reading Co.*, 253 U.S. 26 at 62 (1920); *Steven v. Roscoe Turner Aeronautical Corp.*, 324 F.2d 157 at 161 (7th Cir. 1963); *Spears v. Transcontinental Bus System*, 226 F.2d 94 at 98 (9th Cir. 1955), cert. denied, 350 U.S. 950 (1956); *Owl Fumigating Corp. v. Calif. Cyanide Co.*, 24 F.2d 718 at 719 (Del. 1928), aff'd, 30 F.2d 812 (3d Cir. 1929), and *Kentucky Electric Power Co. v. Norton Coal Mining Co.*, 93 F.2d 925 at 926 (6th Cir. 1938).

4. The problem of pollution of the international boundary waters, including Lake Erie, involves complex and difficult evidentiary problems of causation, liability

and damage. Since *this* problem of pollution involves the interests of Ohio, Dow Canada, a Canadian Corporation, Dow U. S., a stockholder exercising no control over its subsidiary, extra-territorial acts, foreign policy, the Treaty 1909, intimate familiarity with scientific, ecologic and economic facts, movement of waters and the admixture of all kinds and types of pollutants, this Court should decline jurisdiction since the International Joint Commission, an alternative tribunal, has demonstrated that with its powers of continuing investigation and supervision it has sufficient flexibility to safely control this complex problem now and in the future. See *Report of the International Joint Commission on the Pollution of Boundary Waters* (1951) at 166; Vol. 1—*Summary—Report to the International Joint Commission* (1969), at 7 and 8; Vol. 2—*Lake Erie, Report to the International Joint Commission* (1969), Sec. 3.3.2 at 236; Waite, *The International Joint Commission—Its Impact on Land Use*, 13 BUFF. L. REV. 93 (1963-4); *Georgia v. Penna. R.R.*, 324 U.S. 439 at 470 (1945); 11 STAN. L.R. 665 at 695 (1959), and *Colorado v. Kansas*, 320 U.S. 383 at 392 (1943).

Respectfully submitted,

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FILE COPY

Supreme Court U.S.
FILED

OCT. 27 1900

NO. 42, ORIGINAL

C. H. W. B. CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1900

STATE OF OHIO, EX REL., PAUL W. BROWN, Attorney
General of Ohio, State House Annex, Columbus, Ohio 43215

Plaintiff,

—vs—

WYANDOTTE CHEMICALS CORPORATION, A corporation
existing under the laws of Michigan, located at 1600 Middle
Avenue, Wyandotte, Michigan,

DOW CHEMICAL COMPANY OF CANADA, LIMITED, A cor-
poration existing under the laws of the Dominion of Canada,
located at Sarnia, Ontario,

and

THE DOW CHEMICAL COMPANY, A corporation existing
under the laws of Delaware, located at Midland, Michigan,

Defendants.

STATEMENT AND BRIEF OF WYANDOTTE CHEMICALS CORPORATION, ONE OF THE RESPONDENTS, IN OPPOSITION TO THE MOTION FOR LEAVE TO FILE COMPLAINT, WITH APPENDICES

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THE STATE OF OHIO, EX REL., BROWN

INDEX

	<i>Page</i>
STATEMENT AND BRIEF	1
Grounds On Which Jurisdiction Of This Court Is Invoked	2
Purpose of Ohio's Motion	2
Question Presented	3
Statement of the Case	3
ARGUMENT	
I No Affirmative Relief Is In Fact Involved	5
II Filing Of The Complaint Would Conflict With Declared National And International Policy, And Is Contrary To Detailed Procedures Which Have Been Established For The Resolution Of The Problems Of Water Pollution	6
A. Filing of the complaint would subvert the mandatory conference required by the Federal Water Pollution Control Act and produce a flood of litigation in this Court	6
B. Filing of the complaint would discourage state action as mandated by the Federal Water Pollution Control Act	10
C. Filing of the complaint would contravene the procedures of the Boundary Waters Treaty of 1909	13
III The Factual And Legal Situation Differs From The Cases Relied On By Plaintiff	15
A. <i>New Jersey v. New York City</i>	15

B. <i>Georgia v. Tennessee Copper Company</i>	15
(1) No allegation is made of any effort to obtain relief by the State of Michigan.....	15
(2) Ohio has numerous alternatives.....	15
(3) No risk of great damage exists.....	17
CONCLUSION	17
APPENDIX I—Article of Cleveland Press, May 15, 1970.....	1a
APPENDIX II—Affidavit of Robert E. Dunn.....	3a
APPENDIX III—Consent Order, Kelley v. Wyandotte Chemicals Corporation, Circuit Court of Ingham County, Michigan, April 23, 1970.....	7a
APPENDIX IV—Portion of Transcript of Lake Erie Enforcement Conference, not yet printed.....	9a

CITATION OF AUTHORITIES

Case Authority:

	<i>Page</i>
<i>Far East Conference v. U.S.</i> , 342 U.S. 570 (1952)	10
<i>Georgia v. Tennessee Copper Company</i> , 206 U.S. 230 (1907)	2, 15, 16, 17
<i>Missouri v. Illinois</i> , 180 U.S. 208 (1901)	15
<i>New Jersey v. New York City</i> , 283 U.S. 473 (1931)	2, 15
<i>New York v. New Jersey</i> , 256 U.S. 296 (1921)	8, 10
<i>North Dakota v. Minnesota</i> , 263 U.S. 265 (1923)	15
<i>Texas & Pacific Railway Company v. Abilene Cotton Oil Co.</i> , 204 U.S. 426 (1907)	10
<i>U.S. v. Western Pacific R. Company</i> , 352 U.S. 59 (1956)	10
<i>White Lake Improvement Association v. City of White- hall</i> , 22 Mich. App. 262 (1970)	13, 16

Treaty:

Treaty Between the United States and Great Britain Relating to Boundary Waters Between the United States and Canada, Dated January 11, 1909, and Proclaimed May 13, 1910, 36 Stat. 2448	2, 13, 14, 16
--	---------------

Statutes:

Constitution of the United States, Article III, Section 2, Clause 2	2
United States Code, Title 28, Section 1251	2
Federal Water Pollution Control Act, as amended, United States Code, Title 33, Section 466 et seq.	6-8, 10-13, 16
Environmental Quality Improvement Act of 1970, Pub. L. 91-224, 84 Stat. 114	11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

**STATE OF OHIO, EX REL., PAUL W. BROWN, Attorney
General of Ohio, State House Annex, Columbus, Ohio 43215**

Plaintiff,

—vs.—

**WYANDOTTE CHEMICALS CORPORATION, A corporation
existing under the laws of Michigan, located at 1609 Biddle
Avenue, Wyandotte, Michigan,**

**DOW CHEMICAL COMPANY OF CANADA, LIMITED, A cor-
poration existing under the laws of the Dominion of Canada,
located at Sarnia, Ontario,**

and

**THE DOW CHEMICAL COMPANY, A corporation existing
under the laws of Delaware, located at Midland, Michigan,**

Defendants.

**STATEMENT AND BRIEF OF WYANDOTTE
CHEMICALS CORPORATION, ONE OF THE
RESPONDENTS, IN OPPOSITION TO THE
MOTION FOR LEAVE TO FILE COMPLAINT,
WITH APPENDICES**

STATEMENT AND BRIEF

This Statement and Brief is filed on behalf of the Defendant, Wyandotte Chemicals Corporation (hereinafter called "Wyandotte") in opposition to the Plaintiff's Motion for Leave to File Complaint. Plaintiff is hereinafter called "Ohio", and its Attorney General "Petitioner".

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

Ohio invokes this Court's jurisdiction under Article III, Section 2, Clause 2, of the Constitution of the United States; Title 28 U.S.C., §1251; *Georgia v. Tennessee Copper Company*, 206 U.S. 230 (1907); *New Jersey v. New York City*, 283 U.S. 473 (1931); and on a purported urgency for action by this Court. Reference is made by Ohio to Art. IV of the treaty between the United States and Great Britain dated January 11, 1909 and proclaimed May 13, 1910.

Art. III, Sec. 2 of the Constitution of the United States, and 28 U.S.C., §1251 would, absent other factors, permit this Court to assume jurisdiction herein.

PURPOSE OF OHIO'S MOTION

The Complaint prays that alleged conduct of Wyandotte be declared a public nuisance and seeks the abatement thereof together with incidental relief.

Contemporaneous statements by the Petitioner indicate that this is an appropriate categorization of the relief sought and that the purpose exists to establish a precedent for further intimate involvement of this Court in affirmatively dealing with interstate pollution cases.⁽¹⁾

The brief *amicus curiae* of the Attorney General of the State of Michigan suggests that this Court's action here would be of a "precedent setting nature", and that this Court, based on a "frank admission . . . (of) the neglect

¹. Petitioner was quoted on May 15, 1970 in an article in The Cleveland Press, reproduced in its entirety as Appendix I, as follows:

"Brown explained that if the Supreme Court issued an injunction to stop polluting the streams, 'you know the company against whom the injunction was issued will stop, period. More important, it will open the door for similar suits, thus giving the people an edge in the battle against pollution'."

"He said that once the door is open, the court could involve itself with other polluters because 'other parties would file suit the same way Ohio has to stop the menace.'"

of states . . .", should furnish judicial guidance applicable to "the vastness of the Great Lakes Basin and its attendant problems".

Such views support the conclusion that the purpose of the Motion is to constitute this Court a super-authority controlling pollution by exercise of its original jurisdiction.⁽²⁾

QUESTION PRESENTED

The question presented by the Motion of Ohio for Leave to File its Complaint is limited solely to whether this Court should assume original jurisdiction in the overall context in which the question is presented.

STATEMENT OF THE CASE

Since only two cases are cited by Ohio, one of which may have been within the original *and exclusive* jurisdiction of this Court, a resume of the facts (duly supported by the affidavit of Robert E. Dunn, the original having been submitted to this Court, reproduced in its entirety as Appendix II), is appropriate.

From 1938 to March 24, 1970, Wyandotte has operated its mercury cell chlorine-caustic soda plant at Wyandotte, Michigan, and discharged certain waste waters into the Detroit River, subject to frequent surveillance of its activities by the Michigan Water Resources Commission (and its predecessor, the Michigan Stream Control Com-

². Contrast may be made of the facilities of this Court with the position of the single State, Michigan, whose Water Resources Commission consists of one hundred ten (110) employees, of whom seventy (70) are assigned to pollution matters. Without endeavoring to analyze existing Federal staffing of the Department of the Interior (including the Federal Water Quality Administration, the Bureau of Commercial Fisheries, and other related groups), the proposed Environmental Protection Administration is reported to involve six thousand (6,000) employees and a preliminary budget of \$1,400,000,000. Air and Water News, Vol. 4, No. 28, McGraw Hill, July 13, 1970.

mission), the International Joint Commission and other commissions and agencies.

The Canadian government on March 23, 1970 banned the taking of fish from Lake St. Clair, geographically situated twenty miles upstream from Wyandotte's plant, after having found concentrations of "mercury" in certain fish at levels deemed unsafe by such government.

Upon advice of this action, Wyandotte conducted intensive studies of its own plant operation, and on April 3, 1970 obtained preliminary approval from the Michigan Water Resources Commission for a proposed treatment method, installed on April 10, 1970.

On April 16, 1970, Wyandotte closed the plant temporarily in response to a restraining order issued by the Circuit Court of Ingham County, Michigan. Such restraining order was dissolved as a result of a Stipulation signed and Consent Order entered respectively on April 22 and 23. The Consent Order is annexed hereto as Appendix III.

Recycling of waste waters into brine wells was approved by the Michigan Water Resources Commission and the plant reopened on April 26, 1970. Since that date, all waste waters from the mercury cell process have been recycled, and no mercury has been discharged into the Detroit River, as verified by tests by the Federal Water Quality Administration.⁽³⁾

The Governor of Ohio on April 12, 1970, issued an Executive Order banning taking of fish from Lake Erie, which order was substantially rescinded on April 22, 1970, except as to walleye pike.⁽⁴⁾

³. Reported by Mr. Van Den Berg, Transcript, LEEC, p. 663; Appendix IV, p. 23a.

⁴. Executive Order, April 12, 1970, filed April 13, 1970; Executive Order, April 22, 1970, filed April 23, 1970.

On April 21, 1970, Secretary of the Interior Hickel ordered the convening of the Lake Erie Enforcement Conference, pursuant to the Federal Water Pollution Control Act as amended, and such conference began its deliberations on June 3, 1970. Ohio is a party to such conference.

The Motion For Leave to File Complaint was filed herein on April 28, 1970, and a copy was served on Wyandotte's registered agent in Cleveland, Ohio on April 29, 1970.

Testimony of expert witnesses at the hearing of the Subcommittee on Energy, Natural Resources, and the Environment of the Senate Commerce Committee, and at the hearing before the Department of Natural Resources of the State of Wisconsin, as well as before the Lake Erie Enforcement Conference, have suggested the need for substantial additional research to determine the source and role of numerous contributions of mercury to the environment as related to the concentration of mercury in fish, and have further suggested the requirement of substantial additional research in identifying the effect, if any, upon human beings, and the determination of appropriate tolerance levels and discharge limitations which might be established in the public interest.

ARGUMENT

LEAVE TO FILE COMPLAINT HEREIN SHOULD BE DENIED.

I

NO AFFIRMATIVE RELIEF IS IN FACT INVOLVED.

The Statement of the Case outlined above demonstrates that no mercury or mercury compounds were being discharged by Wyandotte on the date the State of Ohio filed its motion in this court. Wyandotte had consented to refrain from disposing of any waste products containing mercury prior to that time. No facts exist (or existed at the time of the filing of the motion by Ohio) upon which affirmative

relief could have been or can be granted.

The emergency alleged in the motion and brief of Ohio does not exist. Ohio permits the taking, selling and buying of fish from the waters of Lake Erie, with the exception of Walleye Pike, and has granted such permission since April 23, 1970, five days before the motion of Ohio was filed in this court.

No emergency situation exists which would justify invoking this Court's original jurisdiction. The relief prayed is essentially moot.

II

FILING OF THE COMPLAINT WOULD CONFLICT WITH DECLARED NATIONAL AND INTERNATIONAL POLICY, AND IS CONTRARY TO DETAILED PROCEDURES WHICH HAVE BEEN ESTABLISHED FOR THE RESOLUTION OF THE PROBLEMS OF WATER POLLUTION.

(A) *Filing of the Complaint would subvert the mandatory conference required by the Federal Water Pollution Control Act ⁽⁵⁾ and produce a flood of litigation in this Court.*

While neither Ohio nor Michigan has deemed reference to the Act or the proceedings thereunder to which they are parties to be of significance in this case, the Act must be considered.

Section 1 (a) (1) of the Act (33 U.S.C. Section 466 (a)) reads as follows :

5. The Federal Water Pollution Control Act, June 30, 1948, C. 758, 62 Stat. 1155, as amended by: The Water Pollution Control Act Amendments of 1956, July 9, 1956, C. 518, 70 Stat. 498; Pub. L. 86-70, June 25, 1959, 73 Stat. 148; Pub. L. 86-624, July 12, 1960, 74 Stat. 204, 205; The Federal Water Pollution Control Act Amendments of 1961, July 20, 1961, Pub. L. 87-88, 75 Stat. 204; The Water Quality Act of 1965, Oct. 2, 1965, Pub. L. 89-234, 79 Stat. 903, The Clean Water Restoration Act of 1966, Nov. 3, 1966, Pub. L. 89-753, 80 Stat. 1246; and the Water Quality Improvement Act of 1970, P.L. 91-224, 84 Stat. 91, all as set forth in Title 33 U.S.C. §466 et seq.

"The purpose of this Act is to enhance the quality and value of our water resources and to establish a national policy for the prevention, control, and abatement of water pollution."

Declaration of such national policy was described as a major provision of the Act in House Report No. 215. Public Works Committee, March 31, 1965. Section 1(b) of the Act (33 U.S.C. Section 466 (b)) refers to "... the exercise of jurisdiction over the waterways of the Nation and ... the benefits resulting to the public health and welfare by the prevention and control of water pollution ..."

The Act must be interpreted and applied in light of the broad sweep of the commerce power, pursuant to which it was enacted.

Ohio has suggested the applicability of Federal legislation to this case by alleging in its complaint that the actions of Wyandotte were in violation of "statutes of the United States". In seeking to invoke the jurisdiction of this court, however, Ohio has proceeded in a manner inconsistent with the Act.

This legislation constitutes a comprehensive scheme established by Congress to combat all aspects of water pollution in the United States. Pollution of interstate waters is specifically covered in Section 10 (d) of the Act [33 U.S.C. §466g (d)] which sets out the four-stage procedure to be employed when pollution discharges in one state affect the health or welfare of people in another state. If such a situation exists or is alleged to exist it is mandatory that the Secretary of the Interior call a conference to investigate the problems and to make recommendations. At the conclusion of the conference the Secretary must allow the appropriate state water pollution control agency to take necessary remedial action. If remedial action is not taken the Secretary must call a public hearing before a

pecially constituted hearing board to resolve the problem.

If this public hearing does not result in effective action the Secretary of the Interior is authorized to request the Attorney General to bring a court action in a United States District Court on behalf of the United States. Section 10 (h) of the Act [33 U.S.C. § 466g (h)] states:

“The Court shall receive in evidence in any such suit a transcript of the proceedings before the board and a copy of the board’s recommendations and shall receive such further evidence as the court in its discretion deems proper. The court, giving due consideration to the practicability and to the physical and economic feasibility of securing abatement of any pollution proved, shall have jurisdiction to enter such judgment, and orders enforcing such judgment, as the public interest and the equities of the case may require.”

Were there administrative failure (Federal and State) to achieve the results contemplated by the Act, cases such as this would come before a United States District Court (having the benefit of all prior consideration of the matter) and could ultimately come before this Court in the usual course of its exercise of appellate review.

It is reasonable to conclude that the Act’s scheme, already implemented by the Secretary in this instance, was adopted to conform to views expressed in *New York v. New Jersey*, 256 U.S. 296 (1921) at 313, where this Court said:

“We cannot withhold the suggestion, inspired by the consideration of this case, that the grave problem of sewage disposal presented by the large and growing populations living on the shores of New York Bay is one more likely to be wisely solved by co-operative study and by conference and mutual concession on the part of representatives of the states

so vitally interested in it than by proceedings in any court, however constituted."

Those views of this Court, undoubtedly the result of the thirteen years required for disposition of that case, were used as support for Senate Bill 649, pending in the 88th Congress, by Mr. Murray Stein (then, as now, the Assistant Commissioner for Enforcement, FWPCA).⁽⁶⁾

With particular reference to the problems of interstate pollution, the remarks of Mr. Stein point up the strong and effective position of the conference method in resolving precisely the problems here presented, of discharges from several states affecting interstate waters, and the equitable concepts involved.⁽⁷⁾

Mr. Stein has already declared in the pending Lake Erie Enforcement Conference:

"I don't think we can ask communities in Michigan to do something without taking reference to what they are doing in the others."⁽⁸⁾

The facts as developed at the Lake Erie Enforcement Conference, in which Ohio is a conferee, show that discharges of mercury were continuing from several Ohio sources,⁽⁹⁾ in one case in the face of a cease and desist order from the Ohio Pollution Control Board.⁽¹⁰⁾

6. U.S. Congress, Senate Hearings, Committee on Public Works, Special Subcommittee on Air and Water Pollution, 88th Cong., 1st Sess., p. 47.

7. *Ibid.*, pp. 58-59 The question of Senator Miller postulates precisely the situation here present. The answer of Mr. Stein is illuminating.

8. Typed Transcript of Proceedings, June 3-4, 1970, Fifth Session of the Conference in the Matter of Pollution of Lake Erie and its Tributaries, p. 679. Not yet printed. Available prior to publication, Ace-Federal Reporters, Inc., 415 Second Street N.E., Washington, D.C. 20002. Referred to hereinafter as Transcript, Lake Erie Enforcement Conference. Portions of such transcript are annexed as Appendix IV.

9. *Ibid.*, p.p. 682-3 Discharges specifically identified were those of Diamond Shamrock, Painesville, Ohio; Cleveland Westerly and Southerly sewage treatment plants; Euclid sewage treatment plant.

10. *Ibid.*, p. 682. The discharge involved was that of Detrex Chemical Company.

The "co-operative study . . . and mutual concession" visualized by this Court in *New York v. New Jersey*, *supra*, and the "moral suasion of the conference technique" will in fact be frustrated if a conferee may separately proceed in this Court without concern for its own delinquencies.

The foregoing is entirely consistent with the carefully structured concept of primary administrative jurisdiction, enunciated by this Court in *U.S. v. Western Pacific R. Company*, 352 U.S. 59 (1956), *Far East Conference v. U.S.*, 342 U.S. 570 (1952) and *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.* 204 U.S. 426 (1907). If further support were required for the proposition here advanced, including a weighing of the probable Congressional intent in providing the conference method, it would be found in that concept.

The filing of the Complaint in this action would subvert the carefully designed control scheme incorporated in the Act, result in a flood of similar litigation in this Court,⁽¹¹⁾ and replace the required action of the Secretary with the involvement of this Court. It might appropriately be noted that in disposing of the case of *New York v. New Jersey*, *supra*, this Court gave great weight to a stipulation developed pursuant to a conference.

Congressional compliance with this Court's invitation to deal with such matters by the conference method should not be rejected by permitting the filing of the Complaint.

(B) *Filing of the Complaint would discourage state action as mandated by the Federal Water Pollution Control Act.*

§1(b) of the Act (33 U.S.C. §466 (b)) provides in part as follows:

¹¹. Appendix I.

"In connection with the exercise of jurisdiction over the waterways of the Nation and in consequence of the benefits resulting to the public health and welfare by the prevention and control of water pollution, it is declared to be the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States in preventing and controlling water pollution..."

§1(c) of the Act (33 U.S.C. §466(c)) provides:

"Nothing in this Act shall be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States."

The legislative history makes clear that the Congress had in mind such preservation of basic state responsibilities and jurisdiction, as a part of an overall combination.⁽¹²⁾

The tie between these expressions and the national policy was described thus by Mr. Yates:

"... nothing is so local as a drop of water, or so national as what we do with it."⁽¹³⁾

§10(b) of the Act (33 U.S.C. §466g(b)) provides:

"Consistent with the policy declaration of this Act, State and interstate action to abate pollution of interstate or navigable waters shall be encouraged and shall not, except as otherwise provided by or pursuant to court order under subsection (h) of this section, be displaced by Federal enforcement action."

In the Environmental Quality Improvement Act of 1970 (Public Law 91-224, 84 STAT. 114) Congress reaffirmed the focus on a primary state responsibility in the resolu-

¹² 111 Cong. Rec. 8678 (1965)

Mr. Reuss - "In formulating these amendments concerned Congressmen have been searching for the combination of programs, responsibilities and jurisdictions that would best enable us to halt the growing pollution of our streams."

¹³ 111 Cong. Rec. 8674 (1965)

tion of problems of water pollution. Section 202 provides:

"...

(b) (1) The Congress declares that there is a national policy for the environment which provides for the enhancement of environmental quality. This policy is evidenced by statutes heretofore enacted relating to the prevention, abatement and control of environmental pollution, water and land resources, transportation, and economic and regional development.

(2) The primary responsibility for implementing this policy rests with State and local governments.

(3) The Federal government encourages and supports implementation of this policy through appropriate regional organizations established under existing law..."

The enforcement mechanisms under Section 10 (c) or (d) of the Act [33 U.S.C. §466g(c) and (d)] require the making of recommendations by the Secretary to the State authorities. Under Section 10(f) (1) of the Act [33 U.S.C. §466g(g) (1)], findings are directed to be reported to "the State water pollution control agency . . . of the State or States where such discharge or discharges originate". Only following failure of such state or states to act is Federal enforcement possible.

In respect of the jurisdiction of other States, Section 4 of the Act (33 USC §466b) was structured to permit "individual states having no jurisdiction over the waters that are beyond the State lines . . . (to) . . . create a regional compact."¹⁴

Absent such regional or interstate compact, the "national policy" of the Act places on Michigan that primary responsibility emphasized in §1(b) of the Act. Its Water

¹⁴ Mr. Lausche, 111 Cong. Rec. 1543 (1965)

Resources Commission is obviously the "appropriate state water pollution control agency" referred to in Section 10 (e) of the Act (33 U.S.C. §466g(e)). It is its action which is to be encouraged.

While neither Michigan nor Ohio deems reference to its own pollution control agencies important, although it has already been held in Michigan that court action must follow rather than precede agency action,¹⁵ the functioning of such agencies is important to the implementation of the Act.

Availability of concurrent action by this Court would in fact discourage state action, since this Court would simultaneously be endeavoring to resolve the same issue, a fact which would be more apt to produce temerity than alacrity, and to induce that continued "neglect of states" which is here relied on by Michigan in support of the Motion.

(C) *Filing of the Complaint would contravene the procedures of the Boundary Waters Treaty of 1909.*

Ohio relies on the treaty between Great Britain and the United States of January 11, 1909 in invoking the jurisdiction of the Court, and alleges that citizens of the United States and Canada are polluting the boundary waters between these countries in violation of the treaty.

Whether the treaty has relevance to Wyandotte is not material, since by seeking to invoke the jurisdiction of this Court, Ohio ignores the declared policy and those implementing procedures provided in the treaty, which were established for the express purpose of solving disputes

15. *White Lake Improvement Association v. City of Whitehill*, 22 Mich. App. 262 (1970). Absent the stipulation entered into in the case of *Kelley v. Wyandotte Chemicals Corporation* (Appendix III), application of the *White Lake* case would probably have required dismissal of that action filed by the Attorney General.

regarding complex issues of international water pollution.

A purpose of the treaty is set forth as follows:

“ . . . to prevent disputes regarding the use of boundary waters, . . . and to make provision for the adjustment and settlement of all such questions as may hereafter arise . . . ”

Disputes pertaining to alleged pollution of boundary waters were specifically covered by this treaty in Art. IV, as follows:

“ . . . It is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other. ”

The International Joint Commission (hereinafter referred to as the I.J.C.) was created to resolve such boundary water disputes (Article VII).

Article IX of the treaty specifies procedures for settling “questions or matters of difference” between the High Contracting Parties.

Pursuant to Article IX of the treaty the I.J.C. has dealt specifically with international water pollution on several occasions prior to the filing of this motion. Among the boundary waters which were the focus of I.J.C. pollution proceedings were Lake St. Clair, the Detroit River, and Lake Erie, the same waters which are involved in the case at bar. (Dockets 4, 53 and 55 of the I.J.C.) As a result of the I.J.C.’s proceedings in Dockets 53 and 55, both governments requested this body to establish a technical board of advisors to supervise and control pollution of these specific waters. This board of experts is still in existence and makes semi-annual reports on pollution of these waters to the I.J.C., which is the proper forum to resolve international aspects of alleged pollution of the boundary waters between Canada and the United States.

III

**THE FACTUAL AND LEGAL SITUATION DIFFERS
FROM THE CASES RELIED ON BY PLAINTIFF.**

(A) *New Jersey v. New York City*, *supra*, relied on by Ohio, would appear to have been a case within the original and exclusive jurisdiction of this Court, and thus to have presented a problem having a vastly different legal focus. Even if this were not so, however, such case involves the application of factors clearly enunciated by this Court in *Georgia v. Tennessee Copper Company*, analyzed below.

As cases involving original and exclusive jurisdiction, *Missouri v. Illinois*, 180 U.S. 208 (1901) and *North Dakota v. Minnesota*, 263 U.S. 265 (1923) (cited by Michigan) are not decisive of the question here presented, since this case does not involve a suit between two sovereign States.

(B) The case differs from *Georgia v. Tennessee Copper Company*, *supra*., not only in that this case cannot be tried on affidavits, but also in that:

(1) *No allegation is made of any effort to obtain relief by action of the State of Michigan.*

In *Tennessee Copper Company*, plaintiff alleged
“a vain application to the State of Tennessee
for relief,” 206 U.S. 230, 236.

No such allegation is, or could be, made here, as the Statement of the Case and the documents in Appendix III amply document.

(2) *Ohio has numerous alternatives.*

In *Tennessee Copper Company*, this Court noted that “the alternative to force is a suit in this Court”, at 206 U.S. 237, citing *Missouri v. Illinois*, 180 U.S. 208, 241. The “alternative” referred to is obviously the obtaining of the relief prayed.

Methods of obtaining such relief, as to Wyandotte, include:

(i) Actions by the State of Michigan, which encompass:

(a) Action of the Michigan Water Resources Commission already taken;

Such Commission has primary administrative jurisdiction of water pollution matters in the State of Michigan,⁽¹⁶⁾ and is that "State water pollution control agency . . . of the State . . . where such discharge . . . originates", as referred to in Section 10(f) of the Federal Water Pollution Control Act, as amended, 33 U.S.C. Section 466g (f), and the "appropriate State water pollution control agency" referred to in Section 10 (e) of the Act.

(b) Action of Michigan courts, already taken.

(ii) The Lake Erie Enforcement Conference.

Such Conference was convened by order of the Secretary of the Interior on April 21, 1970, and its deliberations commenced on June 3-4, 1970 in the City of Detroit. Ohio is a conferee. The Conference is specifically considering questions relating to the subject matter of this litigation,⁽¹⁷⁾ as well as broader questions.

(iii) The International Joint Commission.

As set forth in II (C) above, the Treaty specifies the methods of invoking the action of the international Joint Commission.

(iv) Other Courts

¹⁶. *White Lake Improvement Association v. City of Whitehall*, op.cit.

¹⁷. See the portions of the report of the Bureau of Commercial Fisheries, Transcript, LEEC, pp. 250-258; Appendix IV, Part A pp. 10a, 11a.

This Respondent does business in the State of Ohio, and has a duly appointed Registered Agent in such State. Indeed, the presently pending Motion was served on such agent on April 29, 1970.

It is difficult to imagine a more complete contrast to the situation presented in *Georgia v. Tennessee Copper Company, supra*. If, as suggested by Michigan, the lack of alternatives is "Central to this Court's cognizance of claims under original jurisdiction", it is evident that the test is not met, the relief prayed having already been obtained.

(3) *No risk of great damage exists.*

In *Tennessee Copper Company*, this Court varied its procedures because "there was ground to fear that great and irreparable damage might be done",¹⁸ thus suggesting that the exercise of jurisdiction might have been partially predicted thereon.

In the Lake Erie Enforcement Conference, the Federal Water Quality Administration has reported that this defendant is not discharging mercury from its plant.

All action which this Court might order of an affirmative nature was either already taken prior to filing of the Motion or is under careful consideration by such Conference.

CONCLUSION

It is, therefore, respectfully submitted that this Court should deny the motion of the Attorney General for the State of Ohio for leave to file the complaint.

MILTON F. MALLENDER	JOHN M. MOELMANN
J. DONALD McLEOD	THOMAS J. WEITHERS
ROBERT T. McBRIDE	1 North LaSalle Street
1022 Ford Building	Chicago, Illinois 60602
Detroit, Michigan 48226	

¹⁸. 206 U.S. 230, at 236.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

STATE OF OHIO, EX REL., PAUL W. BROWN, Attorney
General of Ohio, State House Annex, Columbus, Ohio 43215
Plaintiff,

—VS.—

WYANDOTTE CHEMICALS CORPORATION, A corporation
existing under the laws of Michigan, located at 1609 Biddle
Avenue, Wyandotte, Michigan,

DOW CHEMICAL COMPANY OF CANADA, LIMITED, A cor-
poration existing under the laws of the Dominion of Canada,
located at Sarnia, Ontario,

and

THE DOW CHEMICAL COMPANY, A corporation existing
under the laws of Delaware, located at Midland, Michigan,
Defendants.

APPENDICES

APPENDIX I
The Cleveland Press
D. 393,191
May 15, 1970

Press Ohio Bureau

COLUMBUS — Attorney General Paul W. Brown campaigned for the Republican gubernatorial nomination against crime but particularly against pollution and believes the super weapon to be used in the battle is the U.S. Supreme Court.

Brown said that is why he filed his anti-pollution case against two firms doing business at three locations on the Great Lakes directly with the nation's highest court.

Brown observed the court has handled several pollution matters before. However, it has been many years since an anti-pollution case has been filed with the Supreme Court.

The attorney general's \$8 million suit and injunctive action names Dow Chemical Co. of Canada for its plant at Sarnia, Ontario; the Dow Chemical Co. at Midland, Mich. and the Wyandotte Chemical Corp. at Wyandotte, Mich.

All three plants were accused by Ohio, through the attorney general, of dumping pollutants, particularly mercury, into Lake Erie, thus endangering food, water and recreational resources of the people of the state.

According to Brown, if the court accepts jurisdiction, the battle against pollution will be on in earnest. The time for talk will be over.

Brown explained that if the Supreme Court issued an injunction to stop polluting the streams, "you know the company against whom the injunction was issued will stop, period. More important, it will open the door for similar suits, thus giving the people an edge in the battle against pollution."

The attorney general said the suit against the companies "attacks the problem of pollution of the Great Lakes representing Canada, all dealing with pollution. (*sic.*)

In 1907, the State of Georgia invoked the original jurisdiction of the Supreme Court in an action against a Tennessee firm which Georgia accused of polluting the air with noxious fumes.

Georgia won that test. Then, in 1931, New Jersey sued New York to prevent New York from dumping garbage in the ocean which was washing up on the Jersey shore.

The court accepted jurisdiction and appointed a master to hear the complaint and make recommendations.

According to Brown, both of those cases are the precedents which will allow the high court to accept jurisdiction in this suit.

He said that once the door is open, the court could involve itself with other pollutants and polluters because "other parties would file suit the same way Ohio has to stop the menace."

The attorney general is pinning his hope that the high court accepts jurisdiction on two cases and a treaty between the United States and Great Britain, directly. Why can't the court be preoccupied with the rights of the majority and involve itself in clean water and clean air?"

APPENDIX II

AFFIDAVIT

ROBERT E. DUNN, being duly sworn and on oath, deposes and says as follows:

I am the Secretary and legal director of Wyandotte Chemicals Corporation, a Michigan corporation, (hereinafter called "Wyandotte"), and am familiar with the origin and circumstances of matters relating to the captioned litigation.

The chlorine-caustic soda plant of Wyandotte situated at Wyandotte, Michigan,, in the South Works, employing the mercury cell process for the production of chlorine and caustic soda, was operated on essentially the same principles from 1938 through the early part of 1970, insofar as the discharge of waste waters from the mercury cell chlorine caustic soda plant is concerned. During such period, the South Works was subject to periodic investigation and study by the Michigan Stream Control Commission, its successor the Michigan Water Resources Commission, the International Joint Commission, and other public agencies and bodies. Content of the discharges from the South Works was in fact governed by stipulation between Wyandotte and the Michigan Water Resources Commission, executed in 1966, in which no mention was made of the discharge of mercury.

I was personally advised of public interest and concern in levels of mercury concentrations in fish about March 24, 1970, through newspaper articles relating to the banning of fishing by Canada in Lake St. Clair. On information and belief, other personnel of the company were advised on such

date of an interest on the part of the Michigan Water Resources Commission in the operations of the South Works, although the South Works is situated in excess of twenty miles downstream from Lake St. Clair.

Wyandotte immediately began studies and surveys relating to the operation of its mercury cell processes. Alternate operating systems were tentatively approved on the basis of such surveys on April 1, funded on April 2, and reported to the Michigan Water Resources Commission as to operation of the Wyandotte, Michigan plant on April 3, 1970, on which date such tentative proposals were approved.

Proposals so approved were implemented and placed in operation on April 10, 1970, and the plant was operated in accordance with such revised operating techniques until April 16, 1970, on which date the plant was closed by reason of the issuance of an ex-parte restraining order in the matter of Kelly, Attorney General v. Wyandotte Chemicals Corporation, filed in the Circuit Court for Ingham County, Michigan.

A stipulation was executed on April 22, 1970 between the Company and the Attorney General of the State of Michigan, pursuant to which a consent Order was entered in the above entitled litigation on April 23, 1970. Necessary approvals of the Michigan Water Resources Commission were obtained, and the plant commenced operation on April 26, 1970, utilizing a recycling system pursuant to which all waste waters from the mercury cell process were first treated and then recycled into brine wells.

The recycling of waste waters from the mercury cell pro-

cess has continued to this date, and remains a requirement of the consent Order referred to above.

In my capacity as Secretary and legal director of the Company, I have attended hearings of the Sub-Committee on Energy, Natural Resources and the Environment of the Senate Commerce Committee, held May 8, 1970, in Mt. Clemens, Michigan, the Honorable Philip A. Hart, presiding, and hearings before the Department of Natural Resources of the State of Wisconsin, on May 15, 1970 (Wyandotte having a similar plant in Wisconsin). Limited testimony was offered at such hearings suggesting that miniscule concentrations of mercury present in waters or bottom muds might, through processes not fully known, become concentrated in certain species of fish. Testimony was offered by the Food & Drug Administration, the Federal Water Quality Administration, the Michigan Water Resources Commission, and other persons at the hearing of the Senate Sub-Committee, and testimony was offered by representatives of the Department of Public Health, and a representative of the Canadian Fishery Research Board at the hearings for the Department of Natural Resources.

It is a fair summary of the testimony so offered that the resolution of questions relating to discharge of mercury in the environment involves a multitude of sources of mercury in different forms, whose overall contribution to the concentration of mercury in fish is currently unknown; that the precise application of Swedish research relating to such processes may or may not have application to experiences in American rivers and lakes; that the determination of the process of such concentration in American rivers and lakes and possible effect on human beings will require further research and study, and the setting of appropriate

tolerance limits based upon such additional research and study.

Further deponent sayeth not.

IN WITNESS WHEREOF, I have hereunto set my hand this 23rd day of July, 1970.

/s/ ROBERT E. DUNN

STATE OF MICHIGAN

COUNTY OF WAYNE—ss.

Subscribed and sworn to before me this 23rd day of July, 1970.

IRENE E. POUPORE,

Notary Public, Wayne County, Michigan

My Commission Expires March 17, 1974.

APPENDIX III

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY
OF INGHAM**

FRANK J. KELLEY, Attorney General for the
State of Michigan, for and on behalf of
the People of the State of Michigan and
its agencies,

Plaintiffs,

—vs.—

No. 11569-C

WYANDOTTE CHEMICALS CORPORATION,
a Michigan Corporation,
Defendant.

ORDER

At a session of said Court held in the Court House in
the City of Lansing, County of Ingham, on this 23rd day of
April, 1970.

PRESENT: HONORABLE SAM STREET HUGHES,
Circuit Judge

Upon reading the Stipulation providing for the entry
of a Consent Order heretofore entered into between the
Plaintiff Frank J. Kelley, Attorney General for the State of
Michigan, for and on behalf of the People of the State of
Michigan and its agencies and the Defendant Wyandotte
Chemicals Corporation, and the Court being fully informed
in the premises. **IT IS HEREBY ORDERED AND
DIRECTED that:**

1) The temporary restraining order heretofore entered
in this cause on April 16, 1970 be and is hereby dissolved.

2) The defendant Wyandotte Chemicals Corporation
shall not start up production utilizing the mercury cell
process until such time as the Chief Engineer of the Michi-

gan Water Resources Commission has inspected and approved the system to recycle the process waste waters containing mercury that may originate from the production of products utilizing the mercury cell process.

3) Such approved recycling facilities as stated above in paragraph two shall include chemical pretreatment of waste waters so that the material that is recycled to the brine formation shall have a mercury content that is reduced to the greatest extent possible as judged by the Chief Engineer of the Michigan Water Resources Commission.

4) On or before May 1, 1971, the defendant shall, as a part of its operations, have installed, in accordance with plans and specifications approved by the Chief Engineer of the Michigan Water Resources Commission, above ground recycling facilities that will enable the Company to retain all wastes containing mercury.

5) That the aforesaid above ground recycling facilities shall be so operated so as to prevent mercury losses to the Detroit River and other waters of the state.

6) Any determination by the Chief Engineer of the Michigan Water Resources Commission, as provided in paragraph two, three, and four above, under this order shall be subject to review by the Michigan Water Resources Commission upon petition therefor filed by the defendant within 30 days of such determination.

7) The Court shall retain continuing jurisdiction of this cause for the purpose of making such further orders and determinations as shall be presented to it by further petition of either party hereto after final disposition in accord with the foregoing by the Michigan Water Resources Commission.

SAM STREET HUGHES,

A TRUE COPY

Circuit Judge

S. Ross Hilliard

Ingham County Clerk

APPENDIX IV
EXTRACTS, TRANSCRIPT OF LAKE ERIE
ENFORCEMENT CONFERENCE

(A) SUMMARY OF BUREAU OF COMMERCIAL
FISHERIES STATEMENT, pp. 250-251.

Based on analysis of all available data, the following conclusions are drawn concerning the past, present and future status of the commercial and sport fishery and related aquatic resources of Lake Erie.

1. Lake Erie has been the most fertile and productive of all the Great Lakes. A total of 19 species have been significant in the commercial landings at one time or another. Annual combined U. S. and Canadian production has fluctuated little in the past 50 years, averaging approximately 50 million pounds.

2. The value of the catch is declining, however, which reflects the changing conditions of the fish stocks from high-value to low-value species. High-value species like the sturgeon, northern pike, whitefish, cisco, blue pike, and sauger, have virtually disappeared from the catch. Walleye, yellow perch, white bass, and channel catfish constitute the major remaining species of higher and medium value. These species are declining and show signs of difficulty in perpetuating themselves. Stocks of such less valuable species as freshwater drum, carp, suckers, and goldfish are, with few exceptions, greatly underexploited.

3. Prior to 1954, U. S. fishermen landed more pounds of fish than Canadian fishermen. Now, however, the U. S. catch is less than 20 percent of the total catch from Lake Erie.

4. Three States bordering Lake Erie have been introducing yearling coho salmon since 1968. Growth and survival have been relatively good. However, very little open-

lake research has been conducted and little is known about the impact of coho salmon on other valuable fishery resources such as yellow perch and smelt.

5. By most criteria accepted by limnologists, Lake Erie is classified as a eutrophic lake with changing water quality in both inshore and open waters. Industrial, municipal, and agricultural pollution and enrichment of Lake Erie has caused: (a) massive nuisance and toxic algal blooms of *Microcystic* and *Aphanizomenon*, (b) destruction of the valuable mayfly benthos in the western and central basins, (c) a 20-fold increase in plankton, the diet staple for several nuisance and low-value fishes that have undergone population explosions in the last 15 years, (d) increased levels of such pesticides as DDT and Dieldrin in fish flesh, (e) dangerously high levels of mercury in many fishes, (f) the destruction of spawning areas of some of our most valuable fishes, and (g) disappearance of oxygen from the bottom waters of the central basin during the summer.

6. The concentration of dissolved solids is still well below levels directly lethal to fish and food organisms even though solids have increased by 50 ppm since 1920. However, the continued accelerated rate of increase is cause for future concern.

7. Warm water temperatures and high nutrient levels have led to tremendous algae blooms. This organic production has created in turn a large BOD during decomposition. Furthermore, reduced materials have accumulated in the sediments over the years. The combined BOD and chemical oxygen demand from these two phenomena have caused widespread oxygen depletion in the bottom waters of the western and central basins during periods of summer thermal stratification. The consequence of this has been widespread destruction of bottom organisms so important

in the diet of many Lake Erie fishes. Any increase in nutrient levels or average water temperatures will undoubtedly worsen this situation.

8. Pesticides, heavy metals such as mercury, phenols, cyanides, acids and exotic inorganic and organic chemicals are among the many outright pollutants discharged into Lake Erie. Pesticide levels (DDT and Dieldrin) are moderately low in Lake Erie fishes and all fall safely under the 5.0 ppm level set by the FDA. Mercury levels are, on the other hand, dangerously high. Values in some walleyes and white bass especially have exceeded the action level of 0.5 ppm set by the FDA.

9. Observations on walleye reefs during the 1969 spawning season suggest that the smothering effect of sedimentation on fish eggs and other bottom associated organisms may be detrimental and a major factor in the decline of some of our valuable fish stocks. Obviously, increasing siltation is a serious problem that needs full attention by the appropriate agencies now.

10. The historical record and current status of all the valuable sport and commercial fishes in Lake Erie are presented. The Bureau's program of fishery-limnology research on the fishery and aquatic resources of Lake Erie is described with special emphasis on the continuing effects of environmental degradation on the fishery and related aquatic resources.

11. Practically and legally speaking, halting degradation of the water quality of Lake Erie will require the establishment of sound and workable water quality standards, including standards and criteria for fish and aquatic life. This is an area where acceleration of research is needed. Interim standards will probably have to be set before the results of such research become available.

12. Because of their inherent sensitivity to subtle, long-range environmental changes, fish and aquatic organisms make excellent indicators of such changes. This has not been recognized sufficiently in the past. As more expensive and expansive pollution abatement programs are initiated, more aquatic research on Lake Erie will be needed to measure the effects of such abatement programs.

(B) ADDENDUM FOR BUREAU OF COMMERCIAL
FISHERIES STATEMENT AT JUNE 3, 1970,
LAKE ERIE ENFORCEMENT CONFERENCE AT
DETROIT, MICHIGAN (pp. 252-8)
MERCURY IN FISH¹

by

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Current Situation

Late in 1969, following significant warnings of insidious mercury pollution of the central provinces, studies were quietly initiated by Canadian environmentalists to define the situation. Shortly thereafter, several commercial catches of fish (walleye, northern pike, bass, and jackfish) taken from Lake Winnipeg, Cedar Lake, Saskatchewan River, and Red River in the Province of Manitoba, Canada, were detained by the Canadian Federal Department of Fisheries and Forestries, because they contained mercury residues deemed unsafe for human consumption. Concentrations of mercury in the fish ranged from 5 to 10 parts

¹Taken from the paper "Mercury in Fish," by Harry L. Seagran, LIMNOS, The Magazine of the Great Lakes Foundation, Vol. 3, No. 2, Summer, 1970.

per million (ppm). As an immediate result, more than 700,000 pounds of fish were confiscated and destroyed. Further, all fish from the Saskatchewan River system of Canada henceforth were to be held under detention and tested for mercury before being exported. Mercury residues less than 0.5 ppm (wet weight) were required to clear the emergency embargo. Somewhat later, on April 21, 1970, the Provincial Government announced the general closure of these waters to commercial fishing and also warned anglers of the danger of eating fish taken from these sources, because of their relatively high degree of mercury contamination.

As a result of concurrent testing by Ontario officials, the Canadian government embargoed all commercial fish taken from Lake St. Clair effective March 23, and at the same time cautioned the public against eating fish taken from this lake. Ever widening ripples spread from this first public announcement of the mercury contamination problem. Probably the most staggering revelation at this time, however, was the depth of information that had been developed in Canada on this matter over the last 18-month period, with apparently no awareness in this country as to the seriousness of the situation until mid-March 1970, when the matter was made public. A total ban on taking fish for any purpose from Lake St. Clair and the St. Clair, Clay, Wabigoon, and Detroit Rivers was subsequently announced by Canadian authorities on April 6. These actions were taken after Canadian officials found levels of mercury in walleye, pike, and other species taken from Lake St. Clair considerably in excess of the 0.5 ppm action level set by the Canadian Food and Drug Directorate. Typical of preliminary data (wet weight basis of market form) that resulted in the Canadian closure of the Lake St. Clair commercial

fishery were, for walleye, 1.3 - 1.9 ppm; sucker, 0.8 - 2.0 ppm Hg. Less predacious species and non-bottom feeders showed slightly lower values, according to Canadian spokesmen. Some values as high as 5 ppm in walleye muscle from Lake St. Clair were reported, however.

Following further testing, a similar embargo on walleye and yellow perch from Lake Erie was announced by the Canadian government April 1. Preliminary Canadian mercury data on walleye muscle from western Lake Erie was in the range 0.50 - 2.0 ppm; perch ranged downward from slightly less than 0.5 ppm; smelt appeared well below 0.5 ppm (0.05 - 0.20 ppm). Early in May, the Canadian walleye and white bass fisheries were closed in Lake Erie, as well as walleye in southern Lake Huron, because of the consistent high degree of contamination shown by these species.

United States and Great Lakes states public health officials immediately began investigating the matter from the standpoint of a possible public health threat in this country. In the absence of useful data on the mercury content of commercial—and sport-caught fish in this general area, they initially took a cautious, wait and see attitude. As data became available on fish taken from U.S. waters of the Great Lakes, however, Ohio, Michigan, and New York began instituting varying degrees of fishing bans. Lake St. Clair and connecting waterways have been closed to all types of fishing, with general closures on walleye in western Lake Erie. Embargoes on practically all Lake Erie food fish also are in effect; commercial catches of walleye, yellow perch, and white bass are being rigorously checked before release to the market. Current FDA and state action levels in the U.S. also are at 0.5 ppm, although FDA agency officials have expressed their concern that this

level may be undesirably high to adequately protect human health.

There are no official tolerances in the United States or Canada for mercury residues in any food products. The World Health Organization has not established a tolerance for mercury residues in fish, although it has set a recommended general tolerance for mercury in foods at 0.05 ppm. Sweden has set a tolerance of 1 ppm in fish. The U.S. and Canadian Food and Drug Directorates, on the other hand, have established the interim administrative guideline (action level) at 0.5 ppm for this food commodity. This figure should be regarded as interim, however, pending additional toxicological and survey studies in progress.

Fish present a particular problem, because of a relatively high natural background level of mercury and the role of this commodity in the human diet and its value to the recreational sector. Since early April 1970, several hundred fish samples from the Lake Erie-St. Clair area have been examined by several state and federal agencies. Over one-half of all samples examined thus far from Lake St. Clair exceed 0.5 ppm; about one-fourth of those taken from Lake Erie are in excess of this value. Relatively few values less than 0.2 ppm have thus far been obtained for fish of the highly valuable Erie - St. Clair fishery. A significant lowering the current action level could therefore have far-reaching impact on the recreational and commercial fisheries of this area.

Sources of Contamination

Canadian authorities have now revealed the history of their contamination problem. As in the earlier recognized Swedish situation, it was largely attributed to a number of chlor-alkali plants using a mobile mercury electrode, losing the metal to the environment as a contaminant of the dis-

charged, exhausted electrolytic brines. It is estimated that the chlor-alkali industry loses approximately 0.45 pounds of mercury to the environment per ton of chlorine produced. Based simply on chlorine tonnage figures, the loss of mercury may therefore be as much as 1.2 million pounds per year.

Not overlooked as sources of contamination though are probable contributions from other users of mercury in the Great Lakes area; these are for slimicides in pulp and paper mills, in plastics manufacture (vinyl chloride), agricultural uses (seed dressing and insecticides), antifouling paints (fungicides), and others. During the last decade the annual consumption of mercury has risen from an average of 4 million to an estimated 6 million pounds per year. The major users of mercury in this country are manufacturers of electrical apparatus (25%) and the chlor-alkali industry (20%). Those uses which present the greater potential for pollution of the environment are in chlorine and caustic soda production and agricultural and related uses (as mildew proofing compounds and pesticides); this latter use comprises about 1 million pounds annually.

In the St. Clair area, specific losses of up to 200 pounds of mercury wastes per day have been discharged by the chlor-alkali industry at Sarnia, Ontario, according to Canadian authorities. Several other plants in this general area, both in Canada and the U.S., were also found to be discharging brine wastes containing mercury, although at a lesser rate. During the 20-30 years these plants have been operating, considerable mercury has obviously been discharged to the environment. Recent work by U.S. investigators has shown significant mercury concentrations in bottom sediments in areas below the outfalls of discharg-

ing plants. Values up to 430 ppm have been obtained by investigators working on U.S. waters. According to Ontario spokesmen, levels up to 1800 ppm of mercury were detected in muds immediately below the outfall of one Sarnia plant. Gradients are evident, concentrations dropping to background levels (generally ranging from less than the detectable limit to approximately 2 ppm) within a few miles of the source of contamination. Mercury levels in water generally have been below detectable levels (10 ppb), based on current work in the St. Clair-Erie western basin system.

While various investigations are far from complete at the present time, the following pattern is evident.

1. Where there are chlor-alkali plants, there is good evidence of mercury escapement to the environment. The magnitude of the loss can be minimized by control procedures in the plant.
2. Sources of mercury pollution are being rapidly identified by U.S., state, and Canadian authorities and rigid control procedures (with monitoring) are being made mandatory. No known mercury losses to the environment are being tolerated.
3. While the ecology in a mercury polluted area is undoubtedly affected, the degree of contamination of fish is related to the species, the size, the age, and where the fish is caught. Feeding habits appear to be involved.

Economic Assessment

Any assessment of the economic cost of the current mercury pollution situation in the Great Lakes must be both tentative and non-quantitative in nature. The actual level of physical risk is not yet determined; political and regulatory reaction has been variable from state to state

and is subject to continuing revision. The permanence of the impact of this general publicity on the consuming public is also difficult to determine at this point-in-time.

The problem developed just prior to the opening of the commercial fishing season and caught the processing industry with reduced inventories of lake perch and walleye. A very early and informal survey of the industry reflects that total fish sales from all sources in the Midwest have been reduced about 15 percent since the mercury ban was announced. Although Great Lakes species are re-entering commercial channels, it is anticipated that Midwest sales of lake perch could be reduced by 50 percent over the course of the 1970 season.

The cost to society is very difficult to define and calculate. The following kinds of cost are, in fact, being incurred and their longer term extent can only be guessed.

1. Cost of added enforcement, regulation, inspection, and control.
2. Promotional expense by processors, wholesalers, and retailers disassociating ocean species from Great Lakes species.
3. Cost of holding inventories pending decision.
4. Cost of subsidies (currently under consideration by the state governments, for example) to compensate businessmen hurt from either the commercial or sport fish bans.
5. Loss of revenues to commercial fishermen. Although these businessmen are relatively few in number, the loss to them as individuals is absolute and catastrophic.
6. Loss to processors and distributors of both Great Lakes and marine fish due to reduced volume. This is particularly significant to processors and distributors

in the Midwest, since the ban coincides with high-volume season.

7. Loss to producers of ocean fish products to the extent that the total demand for all fish products is reduced by adverse publicity to any single product.
8. Loss of revenues occurring from the sports fishery, as well as lesser sportsman satisfaction.
9. Loss to the consuming public in that their range of choice is effectively reduced by fear of a whole class of food products.

In all these cases, the loss to each level and sector of the economy has "multiplier" impact on many other sectors. It is far too early to anticipate what the net, longer-term economic and social consequence of the mercury pollution problem will be.

Current BCF Work

One of the actions taken by the Bureau of Commercial Fisheries (BCF), U.S.D.I., following the release of information suggesting the relative seriousness of this contamination problem, was to initiate, on a cooperative basis with other agencies, immediate and preliminary monitoring of fish taken from the Great Lakes system for their mercury content. This initial action was based largely on an evaluation of Canadian information concerning concentrations of mercury in fish caught in international waters, as well as on information gained from the literature and public health related agencies. Initial BCF monitoring had as its objectives an assessment of possible direct harm to commercial and sport fishes of the affected areas, as well as of the indirect adverse impact that would undoubtedly result to the commercial fisheries from this contamination problem and responses available to the commercial industry. The details of this work and resulting data are being made available on

an immediate basis to other agencies of the public sector, recognizing the criteria of evaluation will perhaps differ.

To date, the Ann Arbor, Michigan, Technological Laboratory has been coordinating the BCF collection of appropriate fish samples from the Great Lakes for mercury determinations. Extensive samples have been collected and analyzed from Lake St. Clair and the western basin of Lake Erie. Additional samples are currently being examined from the central and eastern basins of Lake Erie, from southern Lake Huron and Saginaw Bay, and from the southeast sector and Green Bay areas of Lake Michigan. Sampling is also in progress for northern Lake Michigan, and Lakes Superior and Ontario. Sampling is being performed generally by field staff of the BCF Great Lakes Fishery Laboratory, Ann Arbor, with assistance by field staff of the Michigan Department of Natural Resources.

To the extent possible, approximately 15 individual fish are taken randomly (by trained biologists) by on-site sampling from commercial fishing gear in the immediate area of fishing. Data collected include species, date, location, depth, method of harvest, length and weight (of individual fish), and a scale sample (for subsequent age data). All fish of one lot are separated into "marketable product" (headed, dressed, scaled, tail-off) and "offal" (processing waste). Edible and offal composites (after pooling) are weighed for yield data, ground, and sub-sampled for analysis.

Thus far, samples are being analyzed for total mercury content using one or more of several analytical sources. Most of the data have been obtained on samples shipped to Wisconsin Alumni Research Foundation (WARF), Madison, Wisconsin. WARF employs a dithizone extraction of an acid digested sample coupled with atomic absorption

using a boat technique. Some samples are also being examined on a cross-check basis by the Phoenix Memorial Laboratory, The University of Michigan, Ann Arbor, employing a neutron activation method. Plans are being laid to develop an in-house testing capacity at the earliest possible time.

Recommendations

Corrective actions and future research by industry and by state and federal agencies on mercury contamination could take the following steps:

1. The first step, which has already been taken on an emergency basis in the Great Lakes area, is to identify all sources of mercury pollution to the environment and to stop these losses. Extreme measures may be necessary in some cases.
2. A next, very important step is to determine the fate of mercury already in the environment. If, as Swedish studies have indicated, elemental and inorganic mercury discharged as wastes from plant outfalls can serve as precursors to methyl-mercury through biological processes in the environment, then the complex problem of removal may need to be considered. Dredging may be a possibility, but if this is done, the mercury must be deposited in a suitable location to permanently avoid re-entry. Disturbance of the bottom ecology with resulting consequences would be one obvious drawback. Chemical complexing of the mercury to prevent its methylation is another possibility; this approach is currently being evaluated by the Swedes. Any proposal will certainly require careful study and the close cooperation of those involved.
3. A third important action would be to achieve a better

understanding of the health hazard as related to the ingestion of various types of mercury compounds and the establishment of realistic food tolerances. Such tolerances would not only better protect the consumer (and indirectly the angler), but would also help protect enterprises dealing with this food commodity from unwarranted seizures.

4. Consideration should be given to requiring the recording of the sale, use, and loss of mercury, particularly for monitoring inventories and possible losses to the environment. Communication of such information through agencies of the public sector concerned with public health and natural resources could create awareness to problem areas before disasters occur.
5. Toxicological studies should be conducted on selected fish species at all stages of their life history to determine acute and sub-lethal effects of the mercury pollutant. Also, studies of the food chain of these fish should be conducted where there is evidence of a concentration effect through the food chain. A profile of various mercury compounds would also be useful in selected species of fishery organisms, to facilitate a better understanding of changes evidenced by monitoring the environment.
6. Technical conferences should be held at appropriate intervals involving scientists qualified in areas of environmental concern. If held at the international level, prompt dissemination of current research findings could be insured. Coordination of programs is essential. Information must flow freely and rapidly among those concerned. Strong, non-partisan leadership will be required to overcome interagency and geographical hindrances.

(C) PORTIONS OF REPORT OF L. A. VAN DEN
BERG, FEDERAL WATER QUALITY
ADMINISTRATION, RELATING TO SOURCES
OF MERCURY IN LAKE ERIE (pp 662-664).

(Paragraph numbers deleted).

Because of mercury discharges, the State of Michigan stopped the production of chlorine by Wyandotte Chemicals Corporation until a treatment system was developed and the mercury bearing wastes were removed from the receiving waters.

In our latest data on the 22nd of May, there appeared no discharge of mercury from that outfall.

The State of Ohio issued an order to the Detrex Chemical Industries, Inc., Ashtabula, Ohio, on April 13, 1970, to "... cease and desist the discharge of liquid industrial waste containing any mercurial compounds to waters of the State." Some operational changes were made but data collected on May 11, 1970, indicate that Detrex still discharged 1.2 pounds of mercury per day.

Allied Chemical Company, Buffalo Dye Division, Buffalo, New York, is a source of mercury to the Buffalo River. On May 8, 1970, a sample of the plant effluent revealed 0.12 mg/l mercury. The company stated that the process utilizing mercury was not in use on that day. Based on this information, Allied Chemical Company was discharging approximately 4 pounds of mercury per day from sources other than the reported production of disulfo intermediates.

The discharge from Diamond Shamrock, Painesville, Ohio, to the Grand River had a concentration of 0.010 mg/l mercury on April 4, 1970.

The first statement (of a written report, not submitted

in full in the record, Ed. Note) has to be changed. Recently received data revealed that concentrations of 0.002 mg/l occurred at the Ann Arbor, Wayne County, Wyandotte and Detroit sewage treatment plants. These were all on 24-hour composites on the 14th of May.

No measurable concentration of mercury was present in sewage treatment plant effluents investigated in Michigan (State data). Concentrations of 0.003 and 0.004 mg/l mercury were present in Euclid and Cleveland Westerly and Southerly sewage treatment plant effluents, respectively. Although no measurable concentration of mercury was present in the Cleveland Easterly sewage treatment plant effluent, which receives wastes from several users of mercury, 4 mg/kg were present in Lake Erie sediments 100 feet north of the discharge point.

On May 7, 1970, a concentration of 0.011 mg/l mercury was present in the outfall from the National Aeronautics and Space Administration, Lewis Research Center, Cleveland, Ohio. This occurred during a period when there was no discharge from lagoons that supposedly receive all mercury wastes from known sources.

Investigations of additional potential dischargers of mercury to Lake Erie are in progress by the State and the Federal Water Quality Administration.

(D) REMARKS OF MR. STEIN RE MERCURY
TESTING AND OVERALL PROGRAM
(TRANSCRIPT, p. 717)

And let me make one last remark on this. We, and I think I, particularly, have given thought to this mercury problem, but they are talking about all toxic materials. If we can't do this on mercury which is a relatively easy one, what are we going to do on the others? That's why

I say I think we should look at this as kind of a pilot operation in dealing with the whole area of control of toxic materials and see if we can come up with a reasonable program that we can live with and the States can live with and the users of mercury can live with.

COPY

JUL 27 1970

E. ROBERT SEAYER, CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1969

No. 41 ORIGINAL

STATE OF OHIO, EX REL., PAUL W. BROWN, Attorney General of
Ohio, State House Annex, Columbus, Ohio 43215, *Plaintiff*,

v.

WYANDOTTE CHEMICALS CORPORATION, a corporation existing under
the laws of Michigan, located at 1609 Biddle Avenue, Wyandotte,
Michigan,

and

DOW CHEMICAL COMPANY OF CANADA, LIMITED, a corporation exist-
ing under the laws of the Dominion of Canada, located at
Sarnia, Ontario, Canada,

and

THE DOW CHEMICAL COMPANY, a corporation existing under the
laws of Delaware, located at Midland, Michigan, *Defendants*.

**BRIEF OF DOW CHEMICAL OF CANADA, LIMITED
IN OPPOSITION TO MOTION FOR LEAVE
TO FILE COMPLAINT**

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INDEX

	Page
Jurisdiction	1
Governing Constitutional Provisions, Treaties and Statutes	3
Index to Appendices	3
Statement of Questions Presented for Review	4
Statement of the Case	5
Summary of Argument	18
Argument 1—Absence of <i>in personam</i> jurisdiction.	21
Argument 2—State of Ohio is not a party to the prayer for damages. There is, therefore, no original jurisdiction in the Supreme Court of the United States under the Constitution, Article III, Section 2, Clause 2.	29
Argument 3—The nuisance if it exists has been abated by order of the Crown in the right of the Province of Ontario.	33
Argument 4—Improbability of capacity to enforce extra-territorial injunctive relief.	35
Argument 5—The uncertainty of the relief claimed.	38
Argument 6—The jurisdiction of the International Joint Commission.	39
Argument 7—The factual complexity and political sensitivity of the problems involved	42
Argument 8—The Government of the United States is the sole entity entitled to enforce the Treaty of 1909.	46
Conclusion	47

	Page
Appendix I	1a
Appendix II	1a
Appendix III	2a
Appendix IV	17a
Appendix V	19a
Appendix VI	23a
Appendix VII	26a

TABLE OF CASES

Akers v. Mathieson Alkali Works 144 S.E. 492 (Va. Sup. Ct. App. 1928)	33
Arizona v. California 298 U.S. 558 (1936)	41
Arkansas v. Texas 346 U.S. 368 (1953)	31
Z.F. Assets Realization Corporation v. Hull 31 F. Supp. 371 (1948), <i>affirmed</i> 114 F.2d. 464 (1940), <i>Certiorari granted</i> 311 U.S. 632, <i>affirmed</i> 311 U.S. 470 (1941)	40
Attorney General v. The Niagara Falls International Bridge Co. (1873) 20 Grant's Ch. 490	36
Bainford et al v. Newell Roberts [1962] I.R. 95 (Irish Reports)	36
Beaty v. M.S. Steel Co. 276 F.Supp. 259 (D.Md.1968) 401 F.2d. 157 (4 Cir. 1968), <i>cert. denied</i> 89 S.Ct. 686	22 & 26
A.G. Bliss Co. v. United Carr Fastener Company of Canada 116 F. Supp. 291 (D.Mass. 1953), <i>affirmed</i> 213 F.2d. 541 (1 Cir. 154)	29
Blount v. Peerless Chemicals (P.R.) Inc. 316 F.2d. 695 (2 Cir. 1963)	28 & 29
Bomze v. Nardis Sportswear Inc. 165 F.2d. 33 (2 Cir. 1948)	22
Bowman v. Curt G. Joa Inc. 361 F.2d. 706 (4 Cir. 1966)	22
Buffalo Belt and Felt Corporation v. Royal Manufacturing Company 27 F.2d. 400 (D.C. N.Y. 1928)	27
California v. Washington 358 U.S. 64 (1958)	40
Cameron et al v. City of Carbondale 76 A.198 (Pa. Sup. Ct. 1910)	45

Index Continued

iii

	Page
Cannon Manufacturing Company v. Cudahy Packing Company 267 U.S. 333 (1925)	29
Chamberlain v. Ciaffoni 96 A.2d. 146 (Pa. Sup. Ct. 1953)	33
Chunky Corporation v. The Blumenthal Brothers Chocolate Company 299 F. Supp. 110 (D.C. N.Y. 1969)	26
City of Elizabeth v. Gilchrist 86 A.535 (N.J. Ch. 1912)	33
Colorado Builders Supply Company v. Hinman Bros. Construction Company 304 P.2d. 892 (Colo. Sup. Ct. in Bank 1956)	27
Compania Mexicana Refinadora Island v. Compania Metropolitana de Oleoductos S.A. et al 250 N.Y. 20, 164 N.E. 907 (Ct. App. 1928)	29
Conn v. I.T.T. Aetna Finance Company 252 A.2d. 184 (R.I. Sup. Ct. 1969)	27
Detsch and Company v. Calbar Incorporated 228 Cal. App. 2d. 556, 39 Cal. Rptr. 626 (Dist. Ct. App. 1964)	28
Deveny v. Rheem Manufacturing Company Limited 319 F.2d. 124 (2 Cir. 1963)	28
Duke v. The Pioneer Mining and Ditch Company 280 F. 883 (D.C. Wash. 1922)	27
Dutton v. Rocky Mountain Phosphate Incorporated 450 P.2d. 672 (Mon. Sup. Ct. 1969)	34
Dyer v. Simms 341 U.S. 22 (1951)	45
Emmanuel v. Symon [1908] 1 K.B. 302 (C.A.)	36
Eyerly Aircraft Company v. Killian 414 F.2d. 591 (5 Cir. 1969)	28
Fisher Governor Company v. The Superior Court of San Francisco 53 Cal. 2d. 222, 347 P. 2d. 1, 1 Cal. Rptr. 1 (Sup. Ct. in Bank 1959)	27
Fremay Inc. v. The Modern Plastic Machinery Corp. 15 A.D. 2d. 235, 222 N.Y.S. 2d. 694 (App. Div.) ..	22
Gaines v. Farmer 55 Tex. Civ. A. 601, 119 S.W. 874 (1909)	37
Gauthier v. Routh (1843) 6 U.C.Q.B. (O.S.) 602 (Upper Canada Queen's Bench)	36
Georgia v. Pennsylvania Railway Co. 324 U.S. 439 (1945)	31 & 34
Georgia v. Tennessee Copper Company 206 U.S. 230 (1907)	32 & 40

Gilbert v. The Moline Water Power and Manufacturing Company 19 Iowa 319 (1866)	37
Green v. Equitable Power Manufacturing Company 99 F. Supp. 237 (D.C. Ark. 1951)	26
Gunter v. Arlington Mills 171 N.E. 486 (Mass. Sup. Jud. Ct. 1930)	37
Hannevig v. The United States 84 F. Supp. 743 (Ct. Cl. 1949)	40
Hanson v. Denckla 357 U.S. 235 (1958)	22
Hawaii v. Standard Oil Company of California 301 F. Supp. 982 (D. Hawaii 1969)	30
Hutchinson v. Chase and Gilbert 45 F.2d. 139 (2 Cir. 1930)	26
Independent News Co. v. Williams 404 F.2d. 758 (3 Cir. 1968)	34
International Shoe Company v. The State of Washington 326 U.S. 310 (1945)	22, 27, 28
Johnson v. Lancaster 266 S.W. 565 (Tex. Civ. App. 1924)	45
Kinahan v. Kinahan (1890) 45 Ch. D 78	36
Kramer v. Vogl 17 N.Y. 2d. 27, 267 N.Y.S. 2d. 900, 215 N.E. 2d. 159 (Ct. App. 1966)	26
K.V.O.S. Incorporated v. The Associated Press 299 U.S. 269 (1936)	29
Litsinger Sign Company v. American Sign Company 11 Ohio State 2d. 1, 227 N.E. 2d. 609 (Sup. Ct. 1967)	26
Lizotte v. The Canadian Johns-Manville Company Limited 387 F.2d. 607 (1 Cir. 1967)	26 & 28
Louisiana v. Texas 176 U.S. 1, (1900)	40
Marshall v. Marshall (1888) 38 Ch. D. 330 (C.A.)	36
Marshall Egg Transport Company v. Bender-Goodman Company 275 Minn. 534, 148 N.W. 2d. 161 (Sup. Ct. 1967)	26
McCabe et al v. Watt et al 73A. 453 (Pa. Sup. Ct. 1909)	45
McGowan et al v. Columbia River Packers Association et al 219 F. 365 (9 Cir. 1914), <i>affirmed</i> 245 U.S. 352 (1917)	37
McKee Electric Company v. Rauland—Burg Corporation 20 N.Y. 2d. 377, 283, N.Y.S. 2d. 34, 229 N.E. 2d. 604 (Ct. App. 1967)	26

Index Continued

v

	Page
Meehling Barge Lines v. United States 368 U.S. 324 (1961)	33
Miller v. Edison Electric Illuminating Co. 66 A.D. 470, 73 N.Y.S. 376 (App. Div. 1901)	33
Minnesota v. Northern Securities Co. 184 U.S. 199 (1902)	41
Mississippi & Missouri Railroad Company v. Ward 2 Black (67 U.S.) 485 (1862)	37
Missouri v. Illinois 180 U.S. 208 (1901)	40
Muraco v. Ferentino 247 N.Y.S. 2d. 598 (Sup. Ct. 1964)	27
New York v. New Jersey 256 U.S. 296 (1921)	40
GMO Niehaus & Co. v. The United States 373 F.2d. 944 (Ct. Cl. 1967)	40
North Dakota v. Minnesota 263 U.S. 365 (1923)	30
Oklahoma v. Atchison etc. Railway Co. 220 U.S. 277 (1911)	30
Oklahoma ex rel. Johnson v. Cook 304 U.S. 387 (1938)	31
Oster v. Dominion of Canada 144 F. Supp. 746 (N.D. N.Y. 1956), <i>affirmed</i> 238 F.2d. 400 (2 Cir. 1956), <i>cert. denied</i> 353 U.S. 936 (1957)	41
Perkins v. Benquet Consolidated Mining Company 342 U.S. 437 (1952)	22, 27, 28
Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corporation 309 F. Supp. 1057 (E.D. Pa. 1969)	30
Pulson v. American Rolling Mill 170 F.2d. 193 (1 Cir. 1948)	22
Roberts v. Evans Case Co. 218 F.2d. 893 (7 Cir. 1955)	22
Royal Fraternal Union v. Lundy 51 Tex. Civ. A. 637, 113 S.W. 185 (1908)	37
Sharpes Commercial Ltd. v. Gas Turbines Ltd. [1965] N.Z.L.R. 819 (New Zealand)	36
Smeltzer v. Deere and Company 252 F. Supp. 552 (W. D. Pa. 1966)	28
Societe Cooperative Sidmetal v. Titan International Ltd. [1966] 1 QB 828	36
B. K. Sweeney Company v. The Colorado Interstate Gas Company 429 P. 2d. 759 (Okla. Sup. Ct. 1967)	28
Tetco Metal Products Inc. v. Langham 387 F. 2d. 721 (5 Cir. 1968)	26
Re Trepea Mines Ltd. [1960] 1 W.L.R. 1273	36
United States v. W. T. Grant Co. 345 U.S. 629 (1953)	33

	Page
Velandra v. Regie Nationale Des Usines Renault 336 F. 2d. 292 (6 Cir. 1964)	27
Watkins v. North American Land & Timber Co. Limited 31 S. 172 (La. Sup. Ct. 1902)	35
Western Union Telegraph Co. v. Pacific and A. Tele- graph Co. 49 Ill. 90 (1868)	37
Young Spring and Wire Corporation v. Smith 176 So. 2d. 903 (Fla. Sup. Ct. 1965)	28

TEXT BOOKS

Dicey & Morris, THE CONFLICT OF LAWS (8th ed. 1967)	36
Lord McNair, THE LAW OF TREATIES (2nd ed. 1961) ..	46
Clive Parry, THE LAW OF TREATIES, ch. 4 of MANUEL OF PUBLIC INTERNATIONAL LAW 220 (M. Sorensen ed. 1968)	46
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8 Canadian Encyclopedic Digest (2nd ed.) 383-4	36
32 C.J. 75 and 43 C.J.S. 459	35
Decision of the Trail Smelter Arbitral Tribunal, 35 AM. J. INT'L LAW 684 (1941)	41
Decision of the Trail Smelter Arbitral Tribunal, (1963) 1 CANADIAN YEAR BOOK OF INTERNATIONAL LAW 213	41
The Original Jurisdiction of the United States Supreme Court, 11 STANFORD LAW REVIEW 665	40

CONSTITUTION AND STATUTES

1. Article III, Section 2, Clauses 1 and 2 of the Con-
stitution of the United States. See Appendix I. . . 2 & 29
2. Part B(3) of Section 1251 of Title 28 of the United
States Code. See Appendix II. 3
3. Boundary Waters Treaty of 1909 between the Gov-
ernment of the United States and the Government
of Great Britain (on behalf of Canada). See Ap-
pendix III. 5, 39 et seq., 42 et seq. & 46

IN THE
Supreme Court of the United States

OCTOBER TERM, 1969

No. 41 ORIGINAL

STATE OF OHIO, EX REL., PAUL W. BROWN, Attorney General of
Ohio, State House Annex, Columbus, Ohio 43215, *Plaintiff*,

v.

WYANDOTTE CHEMICALS CORPORATION, a corporation existing under
the laws of Michigan, located at 1609 Biddle Avenue, Wyandotte, Michigan,

and

DOW CHEMICAL COMPANY OF CANADA, LIMITED, a corporation existing
under the laws of the Dominion of Canada, located at
Sarnia, Ontario, Canada,

and

THE DOW CHEMICAL COMPANY, a corporation existing under the
laws of Delaware, located at Midland, Michigan, *Defendants*.

**BRIEF OF DOW CHEMICAL OF CANADA, LIMITED
IN OPPOSITION TO MOTION FOR LEAVE
TO FILE COMPLAINT ¹**

JURISDICTION

1. The State of Ohio applies for leave to file a complaint claiming relief in two separate and distinct capacities:

- (1) on its own behalf as *parens patriae*, and
- (2) as Trustee for and on behalf of the citizens and inhabitants of Ohio.

2. On its own behalf it claims in its prayer for injunctive relief restraining among others the defend-

¹ This is the correct corporate name of the defendant wrongly styled Dow Chemical Company of Canada, Limited.

ant, Dow Chemical of Canada, Limited, from committing a public nuisance, and further injunctive relief restraining the same defendant from introducing mercury and mercury compounds into Lake Erie or any tributary thereto.

3. In its capacity as Trustee and owner in trust it claims a mandatory injunction or damages in lieu thereof requiring the removal of the poisonous mercury and mercury compounds from Lake Erie and any tributaries thereto "if that is found to be feasible" or alternatively a decree for damages "*to be held in trust* and expended only for this purpose".

4. Further in its capacity as Trustee there is a prayer for a decree for damages "compensating for the existing and future damages to Lake Erie, the fish and other wildlife, the vegetation and the citizens and inhabitants of Ohio."

5. The action is brought against two corporations physically situate and carrying on business in the State of Michigan, another one of the States of the United States of America. Also named as a defendant is Dow Chemical of Canada, Limited, a corporation incorporated under the laws of the Dominion of Canada and resident within the Province of Ontario, one of the provinces of the Dominion of Canada.

6. The plaintiff seeks to invoke the jurisdiction of this Court by reliance upon Article III, Section 2, Clause 2 of the Constitution of the United States which reads in part as follows:

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction."

and also Section 1251 of Title 28 of the United States Code which reads in part as follows:

“B—The Supreme Court shall have original but not exclusive jurisdiction of: . . . (3) all actions or proceedings by a State against the citizens of another State or against aliens.”

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES

1. Article III, Section 2, Clauses 1 and 2 of the Constitution of the United States. See Appendix I.
2. Part B(3) of Section 1251 of Title 28 of the United States Code. See Appendix II.
3. Boundary Waters Treaty of 1909 between the Government of the United States and the Government of Great Britain (on behalf of Canada). See Appendix III.

APPENDICES

APPENDIX III—Constitutional provision, treaties and statutes.

APPENDIX IV—Map of Lake Erie and Lake Ontario drainage basins.

APPENDIX V—Letter from John P. Robarts, Prime Minister of Ontario, to City Clerk, City of Sarnia, dated May 15th, 1970.

APPENDIX VI—Order of the Ontario Water Resources Commission dated March 26, 1970.

APPENDIX VII—Letter from O.W.R.C. to Dow Chemical of Canada Limited, dated May 13, 1970.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Is there original jurisdiction in the Supreme Court of the United States with respect to a claim against an alien which is not subject to the *in personam* jurisdiction of the Supreme Court of the United States where that claim arises out of conduct by that alien in another country?

2. Is there original jurisdiction in the Supreme Court of the United States with respect to that portion of the prayer for relief relating to a money decree for damages where that relief is not sought on behalf of the State of Ohio itself but instead in the name of the State of Ohio in its capacity as Trustee of and for the citizens and inhabitants of the State of Ohio?

3. Will the Supreme Court of the United States assume jurisdiction in an action founded on an alleged nuisance where, so far as this defendant, Dow Chemical of Canada, Limited is concerned, the alleged nuisance was abated at the direction of and subject to the continuing jurisdiction of the Crown in right of the Province of Ontario prior to the institution of these proceedings for leave to file a complaint?

4. Will the Supreme Court of the United States assume jurisdiction in a matter where it is doubtful whether it can enforce its judgment or compel compliance with its orders and in particular where in this case extra-territorial injunctive relief is sought against a Canadian corporation?

5. Will the Supreme Court of the United States assume jurisdiction where the relief requested of the court is a relief which is incapable of enforcement by reason of its lacking in certainty because it requires

the court to embark upon speculative assessments of damages and to create trusts which are themselves incapable of certainty:

- (i) as to vesting;
- (ii) as to class;
- (iii) as to events?

6. Does the 1909 (Boundary Waters) Treaty between the United States of America and Great Britain (on behalf of Canada) provide the proper mechanism for investigating and, if necessary, adjudicating upon controversies involving pollution of the Great Lakes?

7. Should the Supreme Court of the United States assume jurisdiction in a case involving delicate international questions of political sensitivity and complex questions of fact where the two Sovereign Governments concerned have established and empowered a specialized agency to investigate and adjudicate precisely such problems pursuant to Articles IX and X of the 1909 Boundary Waters Treaty?

8. Does any entity other than the Government of the United States have the right in International Law to enforce an International Treaty entered into by the Government of the United States?

STATEMENT OF THE CASE

1. There is no suggestion either in the proposed complaint or in the material filed that the State of Ohio asserts any proprietary right other than as Trustee for the citizens and inhabitants of the State of Ohio.

2. Any injury which may have been suffered by the plaintiff either in its capacity as a quasi-sovereign or

as Trustee for its citizens and inhabitants must in similar capacity have been sustained by the following states:¹

- (i) the State of New York;
- (ii) the State of Pennsylvania;
- (iii) the State of Michigan;
- (iv) the Province of Ontario;
- (v) the United States of America in its Sovereign Capacity;
- (vi) the Dominion of Canada in its Sovereign Capacity.

3. Not until the early months of 1970 did it become known in North America that metallic mercury, previously believed to be harmless to living things when immersed in water, could perhaps be very slowly converted by certain types of micro-organisms (in an environment where these micro-organisms were present) into a potentially dangerous compound, methyl mercury.² It was further discovered at or about the same time that fish taken from the St. Clair River and taken from Lake Erie contained within their flesh values of methyl mercury suspected of being significant.

4. Dow Chemical of Canada, Limited, has not at any time, nor has any one ever suggested that it has at any time, introduced methyl mercury into the waters of the St. Clair River. The only forms of mercury asserted to have been introduced into the St. Clair River have been metallic or inorganic forms of mercury here-

¹ See Appendix IV—Map of St. Clair River—Lake Erie and environs.

² See Appendix V.

tofore regarded by all persons and Governments as being harmless when immersed in water.

5. In February 1970, the Ontario Water Resources Commission advised Dow Chemical of Canada, Limited that it must "take immediate steps to eliminate any discharge of mercury from its establishment to the water environment." This informal advice was followed by a written order issued March 26, 1970³ requiring Dow Chemical of Canada, Limited to install on or before April 15, 1970 facilities which would assure that no mercury would escape to the environment, to keep such facilities in repair and operate them as directed by the Commission, and to sample, analyze and report to the Commission twice a month concerning liquid effluent discharge from its plant.

6. Dow Chemical of Canada, Limited already had a programme for eliminating mercury losses under way by February of 1970. At the Commission's request this programme was speeded up and completed on a crash basis on March 27, 1970 by taking extreme measures, including literally cementing shut the sewer openings at the Sarnia mercury-cell plants and shutting down a caustic concentrating plant. As explained by the Manager of Environmental Quality Control for Dow Chemical of Canada, Limited to a Standing Committee of the Ontario Legislature inquiring into the Ontario Water Resources Commission:

"On February 4, 1970, O.W.R.C. provided the Company with mercury analyses of the fish and asked the Company for additional information on the escape of mercury from the plant and for a speed-up of the programme which we had underway for reducing our mercury losses. As a result

³ See Appendix VI.

of that request we immediately implemented a crash programme to eliminate the mercury losses and subsequently, about March 24, we learned of the proposed fishing ban by the Minister of Fisheries. Because of the advanced stage of our activity to prevent all escape of mercury to the river, we were able to make a number of temporary installations of additional lines and equipment and completely seal off the plant within 3 days. Subsequent to that date the temporary installations were progressively replaced by the intended permanent facilities and the plant is now permanently sealed off from escape of mercury to the river."

7. Since that time the Ontario Water Resources Commission has advised Dow Chemical of Canada, Limited both orally and in writing, that the Commission is satisfied with the remedial steps taken by Dow Chemical of Canada, Limited and regards Dow Chemical of Canada, Limited as being in compliance with the Commission's order. On May 13, 1970, the Director of the Commission's Division of Industrial Wastes wrote the manager of Dow Chemical of Canada, Limited's Sarnia plant as follows:

"This is to advise you that compliance with Sections I and II of this order has been executed by your Company. Section III of the order, referring to the maintenance of treatment facilities in a good state of repair and operating condition, will of course remain in effect.

With regard to the frequency of reporting under Section I of the order, it is our view that such reports should now be submitted on a monthly basis commencing June 1st, 1970. This could be included in your regular monthly analyses report."⁴

⁴ See Appendix VII.

8. Intensive investigations since February 1970, by governmental agencies of Federal, State, Dominion and Provincial Authorities, and also by private industry have failed to show whether or not there is or has been any movement of mercury or mercury compounds from the St. Clair River into Lake Erie, or whether or not there is or has been any movement of mercury or mercury compounds across the boundary between Canada and the United States.

"It is not possible to conclude reasonably that specific wastes originating on the Ontario side are transmitted to any given location on the American side in any concentration sufficient to cause an injury which would not be caused by the same or similar wastes originating on the American side, for the following reasons:

- (1) the large volume of water involved;
- (2) the distance between any alleged source of waste on the Ontario side and a given location of injury on the American side;
- (3) the many variable factors affecting the movement of wastes in these waters or in their sediments;
- (4) the numerous sources of the same or similar wastes originating on both sides of the boundary;
- (5) the varying rates of biochemical breakdown of different wastes; and
- (6) the varying rates of re-aeration of these waters."³

9. Similarly these investigations have been wholly unable to produce any correlation of the results ob-

³ Henry Landis, *Legal Controls of Pollution in the Great Lakes Basin*, 48 Canadian Bar Review 66, 131 (1970).

tained from sedimentary and/or fish sampling with any other data. Acute problems exist in the testing and sampling procedures not the least of which are the present technical limitations of testing techniques to detect concentrations of less than .0002 parts per million total mercury.

10. The same investigations have been unable to demonstrate or produce any data one way or the other as would suggest that micro-organisms capable of converting metallic mercury into methyl mercury are present in the waters or sediments in question.

11. It has been established to date that mercury is naturally occurring in the sediments of Lake Erie in quantities in the order of .02 parts per million. It has further been established that there are other major sources of the mercury found to be present in Lake Erie besides that which may have been contributed by these defendants. "There are a wide variety of uses of mercury and mercury compounds and it would just not be possible to provide a complete list." (See Appendix V)

12. Modern science and technology are not capable to date of determining whether or not there exists any possible way of completely removing mercury and its compounds from the waters of either the St. Clair River or Lake Erie. At this moment in time the Province of Ontario is proposing to dredge part of the St. Clair River, while at the same time there is grave concern, based on Swedish research, as to whether or not dredging is the proper method and still further whether dredging will aggravate rather than ameliorate the conditions. Whether or not dredging will succeed in removing the mercury and its compounds is also a matter of great uncertainty.

13. There is no known incident of any injury having been suffered by human beings, wildlife, (including fish), or vegetation resulting from the presence of mercury in either the St. Clair River, Lake St. Clair, the Detroit River or Lake Erie. There is evidence of unexpected methyl mercury values being present in the flesh of fish, but testing of humans to date has not demonstrated abnormal levels in human beings. Nobody knows whether or not, from time immemorial, fish in Lake Erie have had methyl mercury present in their flesh.

14. It has been conceded by all responsible governmental agencies and authorities that the circumstances of this case, so far as this defendant, Dow Chemical of Canada, Limited, is concerned are entirely different from the circumstances of the Minamata Bay tragedy (referred to by the State of Ohio in its Brief at page 14).

15. In the Minamata case the effluent of a vinyl chloride plant containing methyl mercury at that time known to be toxic to humans was discharged directly on shellfish beds from which the local population was known to derive the bulk of its diet.⁶ It is again emphasized that Dow Chemical of Canada, Limited, has never discharged methyl mercury.

16. Dow Chemical of Canada, Limited does not carry on business in the United States of America. Sales of products manufactured by Dow Chemical of Canada, Limited to customers resident in the United States do not constitute more than a minute percentage of the total annual sales volume of Dow Chemical of Canada, Limited.

⁶ P.L. Bidstrup, Toxicity of Mercury and its Compounds p. 77.

17. Dow Chemical of Canada, Limited does not have and never has had:

- (i) an office or plant in the United States;
- (ii) an authorized agent or distributor in the United States;
- (iii) any advertisements in the United States;
- (iv) a telephone listing in any city telephone directory of any American city or town;
- (v) real estate in the United States owned or leased by it;
- (vi) any servants or authorized agents engaged in soliciting sales in the United States from Canada, by mail or telephone;
- (vii) a licence to carry on business in the United States (nor has it ever applied for such a licence);
- (viii) goods stored or warehoused in the United States.

18. Dow Chemical of Canada, Limited conducts its business from sales offices in six Canadian cities, and it maintains manufacturing plants at ten different Canadian locations.

19. The relationship of Dow Chemical of Canada, Limited and The Dow Chemical Company is merely that of a Company and its stockholder. Dow Chemical of Canada, Limited is a completely autonomous, totally independent, operating company which derives its legal existence from and is responsible to the Government of the Dominion of Canada.

20. The operational independence of Dow Chemical of Canada, Limited from The Dow Chemical Company

is indicated by the fact that Dow Chemical of Canada, Limited maintains:

- (a) export operations to Europe and elsewhere in competition with other corporations bearing the "Dow" name;
- (b) independent employment practices and pay-rolls;
- (c) separate meetings of its corporate board;
- (d) independent research activities;
- (e) independent financing of its operations;
- (f) independent marketing and production practices and freedom at a policy level.

21. In 1909 the sovereign powers, United States of America and Government of the United Kingdom of Great Britain (acting on behalf of Canada), entered into a treaty commonly referred to as the Boundary Waters Treaty.

22. The 1909 Treaty contains a substantive agreement in Article IV thereof that boundary waters including, by definition, Lake Erie, Lake St. Clair, the St. Clair River and the Detroit River "shall not be polluted on either side to the injury of health or property on the other". The same Treaty in Article IX thereof provides that:

"matters of difference arising between the High Contracting Parties involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along the common frontier between the United States and the Dominion of Canada, shall be referred from time

to time to the International Joint Commission for examination and report, whenever either the Government of the United States or the Government of the Dominion of Canada shall request that such questions or matters of difference be so referred".

23. As far back as 1915 full scale hearings were held by the Commission with respect to the pollution of the Great Lakes.

24. With the expansion of industrialization on both sides of the international border between Canada and the United States, and the consequent augmentation of the pollution problem, the Commission conducted further investigations and in 1950 made an extensive report on the then state of Great Lakes water pollution.

25. The nature of the Commission's activity in this sphere in the last quarter century can be appreciated by consideration of the following extracts from a paper presented to the 1967 Washington International Conference on Water for Peace under the joint names of Matthew E. Welsh and A.D.P. Heeney, the Chairmen of the American and Canadian Sections of the International Joint Commission:

"In 1950, following an extensive investigation, the Commission reported that these boundary waters [the Great Lakes including Lake St. Clair and the Detroit and Niagara Rivers] were being polluted on each side of the boundary to the injury of health and property on the other side. In consequence, it recommended that certain stated 'Objectives for Boundary Waters Quality Control' be adopted by the Governments as the criteria to be met in maintaining these waters in a satisfactory condition as contemplated in the 1909

Treaty. It also recommended that the remedial measures necessary to meet the 'Objectives' be put into effect and that the Commission be authorized to establish and maintain continuing supervision over the quality of these waters. The Governments approved all of these recommendations. As a result, since that time the Commission has kept itself informed of developments in the area, and where the approved 'Objectives' are not being met or satisfactory assurances are not received that they will be met in a reasonable time, the Commission has taken up the matter with the appropriate authority having local jurisdiction.

There has been the closest co-operation between the Commission and the local pollution control authorities in each country. The results have been encouraging, especially when one considers the extensive industrial development that has occurred in the area during the same period. Substantial progress has been made towards over-all compliance with the 'Objectives'.

....

With regard to pollution of the waters of Lake Erie, Lake Ontario and the International section of the St. Lawrence River, the Commission was asked in 1964: 'Are these waters being polluted on either side of the boundary to an extent that is causing or is likely to cause injury to health or property on the other side? If so, in what localities and by what causes, and what remedial measures would be most practicable in the Commission's judgment?' This is an immense assignment, requiring the very best expert assistance that can be brought to bear in both countries. State, Provincial and Federal Officials served together on the International Board which the Commission has established to organize, co-ordinate and direct the necessary technical investigations. Every effort is being made by the Commission to ensure

that the several governments' resources of qualified personnel and technical equipment are used to best advantage. The Commission has made one interim report to the Governments and others may be expected as the study progresses, in order to inform the Governments without delay of the conditions encountered and recommendations for remedial action.

. . . .

Finally, there is the question of air pollution crossing the international boundary affecting citizens and property interests in both countries. Last September the two Governments requested the International Joint Commission to ascertain whether the air in the vicinity of Port Huron, Michigan—Sarnia, Ontario and Detroit, Michigan—Windsor, Ontario is being polluted on either side of the international boundary to an extent that is detrimental to the public health, safety or general welfare of citizens or property on the other side of the boundary. If this question is answered in the affirmative, the Commission is to indicate the sources and extent of air pollution, and to recommend to Governments the most practical preventive or remedial measures."

26. In February of 1969 the Commission publicly released the text of a January 1969 letter to the United States Secretary of State bearing identification as "I.J.C. Docket Number 54-55" and stating that pollution abatement programmes had been instituted by major industries in the area of Sarnia, Ontario, with the result that the Ontario Water Resources Commission was able to report to the International Joint Commission that within the next year or two it was believed that Canadian industries would be in compliance with the "Objectives" of the International Joint Commission.

27. In September of 1969 the International Joint Commission released Volume I of a report to the International Joint Commission by the International Lake Erie Water Pollution Board, and the International Lake Ontario St. Lawrence River Water Pollution Board. This report dealt with the pollution of Lake Erie, Lake Ontario and the International section of the St. Lawrence River.

28. Volume II of the same report dealing specifically in detail with pollution in Lake Erie was released in the spring of 1970. Volume III dealing with Lake Ontario and the International section of the St. Lawrence River has just been released. Volume II represents a study of over 316 pages based on data collected between 1964 and 1967.

29. In April of 1970 the International Joint Commission released its third interim report on pollution of Lake Erie, Lake Ontario, and the International section of the St. Lawrence River.

30. None of these most recent reports of the International Joint Commission makes any significant mention of mercury pollution, awareness of the problem being of very recent origin.

31. Lake Erie has already (September, 1969) been reported to the International Joint Commission by the International Lake Erie Water Pollution Board, as being polluted. Their conclusion was that Lake Erie was "being polluted on both sides of the boundary (United States—Canada) to an extent that it is causing and is likely to cause injury to health and property on the other side of the boundary."—this entirely without regard to any mercury pollution problem.

SUMMARY OF ARGUMENT

1. The "minimum contacts" principle enunciated by the United States Supreme Court measures the maximum extent to which a State may by legislation enable its courts to acquire *in personam* jurisdiction over defendants. This extended jurisdiction is much wider than the common law test of "carrying on business".

The United States Supreme Court, however, has no "long arm" statutory jurisdiction. Thus, the large number of decisions during the past twenty-five years (following the *International Shoe* decision) cannot be relied upon in determining the jurisdiction of the United States Supreme Court. Such decisions are dependent in each case on the existence of special State "long arm" legislation.

Dow Chemical of Canada, Limited's business contacts with the United States of America are so remote that it cannot be said that it is "carrying on business" within the United States of America. This is so even if a liberal interpretation were given to the traditional meaning of "carrying on business".

These remote "contacts" become totally inadequate to support *in personam* jurisdiction when there is no relationship between the "contacts" and the causes of action advanced by plaintiff.

The burden of establishing *in personam* jurisdiction rests upon the State of Ohio.

The total independence of Dow Chemical of Canada, Limited from The Dow Chemical Company prevents this Court from acquiring original jurisdiction over

Dow Chemical of Canada, Limited by virtue only of its personal jurisdiction over the American corporation.

2. The State of Ohio seeks a decree for damages which are not for its own benefit.

The damages claimed are with respect to an alleged injury to property which by Section 123.03 Revised Code of Ohio "belonged to the State as proprietor in trust for the people of the State" and also with respect to an alleged injury to "the citizens and inhabitants of Ohio".

The damages sought are to be held by the State of Ohio in trust for unspecified citizens.

By the Constitution of the United States the original jurisdiction of this Court does not extend to actions in which a State is not a party in its own behalf. Therefore, that portion of the prayer for money damages is not within the original jurisdiction of the Supreme Court of the United States.

3. A Court of Equity would not order injunctive relief in respect of a nuisance which has already been abated at the direction of and subject to continuing regulation by the Crown in right of the Province of Ontario.

Any injunction which this Court could properly frame must not be an idle gesture. It must be one to prevent threatened injury.

4. Extra-territorial injunctive relief may be incapable of enforcement.

It is the duty of this Court to dismiss an original suit in which it cannot make an effective decree. *A fortiori* it is its duty not to entertain such a suit.

5. There is no certain way of removing mercury and mercury compounds from Lake Erie. Proposals advanced to date are speculative both as to efficacy and the consequences that may flow therefrom. The plaintiff's request for a decree requiring the defendants to remove mercury and compounds thereof from Lake Erie and tributaries thereto should not be entertained by this Court because such an order, in the character of a mandatory injunction, would be incapable of being determined with certainty. The alternative of damages in lieu of a mandatory injunction would also be refused by a Court of Equity (and, therefore, this Court) because their assessment would involve the Court in a speculative enquiry and the creation of trusts which themselves would fail for want of certainty.

6. The diverse and competing interests of the several interested sovereign and quasi-sovereign states bordering the Great Lakes drainage system some of whom are beyond the reach of the jurisdiction of this Court require a more comprehensive and political resolution of the problems than can be afforded by a decree of this Court.

There is in existence an International Joint Commission which has demonstrated a continuing, dynamic, active concern with respect to the specific problem to which the Court is being asked to address itself. This same Commission is possessed of facilities, expertise and capacity to produce a workable solution to the problems beyond the facilities, expertise and capacity of this Court.

7. The International Joint Commission set up under the Boundary Waters Treaty of 1909 is charged with the duty to enquire into precisely the same problem to which this Court is asked to address its mind.

Specifically the International Joint Commission has been requested by the two sovereign powers concerned namely the Government of the United States of America and the Government of the Dominion of Canada to make an enquiry into the precise problem, namely pollution of Lake Erie.

The Treaty of 1909 makes adequate provision for the investigation and adjudication of this particular problem.

8. No entity other than the Government of the United States of America or the Government of the Dominion of Canada has a right to enforce the Boundary Waters Treaty of 1909.

A treaty creates obligations solely between the High Contracting Parties and not between one of these parties and the nationals of the other, nor between the nationals of the two High Contracting Parties.

ARGUMENT NUMBER 1

Is There Original Jurisdiction in the Supreme Court of the United States With Respect to an Alien Who Is Not Subject to the In Personam Jurisdiction of the Supreme Court of the United States?

1. The test currently accepted in American Law for determining whether an American Court may assume personal jurisdiction over a foreign corporation is that corporation's "*carrying on business*" within the territorial jurisdiction of the particular American Court. Whether or not a corporation is "*carrying on business*" within a particular jurisdiction is determined by whether there exist adequate "contacts" between the corporation and the particular jurisdiction. This limitation on the jurisdiction of American Courts is founded on "traditional notions of fair play and sub-

stantial justice" inherent in the "due process" requirements of American constitutional law.¹

2. But it is of paramount importance to recognize that in the leading decisions which enunciated the "contacts" principle the United States Supreme Court was indicating the maximum extent to which the personal jurisdiction of American Courts could be enlarged by *appropriately framed legislation*.

3. The Supreme Court did not purport to say that such extended jurisdiction would exist as a matter of *common law* in the absence of such legislation.²

4. Thus in the *Hanson* case Chief Justice Warren was at pains to distinguish the *McGee* case by stating that "there the State had enacted special legislation".³

5. The essential distinction between the restricted jurisdiction existing as a matter of common law and the considerably wider jurisdiction under "long arm" statutes enacted expressly for the purpose of broadening the basis for jurisdiction has been most cogently expressed by Breitell J. in *Fremay Inc. v. The Modern Plastic Machinery Corp.*⁴ who stated that:

"The *International Shoe* case, and those which have followed in its wake, have merely developed

¹ *International Shoe Company v. State of Washington*, 326 U.S. 310 (1945); *Perkins v. Benguet Consolidated Mining Company*, 342 U.S. 437 (1952); *Hanson v. Denckla*, 357 U.S. 235 (1958).

² *Beaty v. M.S. Steel Co.*, 401 F.2d. 157, 161 (4 Cir. 1968), cert. denied 89 S.Ct. 686; *Bowman v. Curt G. Joa Inc.*, 361 F.2d. 706, 714 (4 Cir. 1966); *Roberts v. Evans Case Co.*, 218 F.2d. 893 (7 Cir. 1955); *Pulson v. American Rolling Mill*, 170 F.2d. 193, 195 (1 Cir. 1948); *Bomze v. Nardis Sportswear Inc.*, 165 F.2d 33 (2 Cir. 1948).

³ *Hanson v. Denckla*, 357 U.S. 235, 252 (1958).

⁴ 15 A.D. 2d. 235, 222 N.Y.S. 2d. 694, 698-9 (App. Div.).

the doctrine that a State may extend the jurisdiction of its courts to encompass actions against a non-resident with respect to matters arising from significant acts of a non-resident in the State But, unfortunately for plaintiff, there is no statute in this State which extends the jurisdiction of the courts of this State to an action based upon any contract which may have significant contacts within the State. . . . Plaintiff argues that because of the development of . . . the substantial contacts doctrine as laid down in the International Shoe case the extent of "doing business" should be correspondingly broadened. The fallacy is that plaintiff is mixing his categories. . . . 'Moreover, there are policy considerations which suggest that any change should be effected by legislation rather than by judicial decision. In that way, circumstances affecting the convenience of commerce may be more generally considered.' . . . In short, while it is now clear that under constitutional due process principles the legislature can today broaden the classes of actions in which a foreign corporation may be sued locally, *the New York statutes have not generally been so extended.*" (emphasis added)

6. There is, however, no "long arm" statutory jurisdiction in the United States Supreme Court. The jurisdiction of the United States Supreme Court as expressed both in Article III, Section 2, Clause 2 of the United States Constitution and in Section 1251 of Title 28 of the United States Code is expressed in terms of classes of individuals over whom the Court may in appropriate circumstances assume jurisdiction; it could not have been intended by these provisions to disregard totally the fundamental principles of territorial limitation upon personal jurisdiction.

7. Similarly, within the Rules of the United States Supreme Court there is no rule respecting "personal

jurisdiction" over "alien" corporations. Rule 33(1) of the United States Supreme Court Rules governs service of process. This rule covers service under all circumstances including appeals, is clearly directed to informational rather than jurisdictional questions and could not have been intended to abrogate the time—honoured tests for determining the existence of "personal jurisdiction".

8. Rule 9(2) of the United States Supreme Court Rules provides that in matters of original jurisdiction the Federal Rules of Civil Procedure may apply in appropriate circumstances. Rule 4(f) of the Federal Rules of Civil Procedure provides for service "within the territorial limits of the state in which the district court is held" except as provided elsewhere within the rules or by statute. Service within the Province of Ontario cannot be upheld by any construction of or analogy to this Rule.

9. Nor may process be served pursuant to Rule 4(e) of the Federal Rules of Civil Procedure. That Rule deals with the utilization in Federal Court Proceedings of the "long arm" provisions of "the state in which the district court is held". This last—quoted phrase has no rational meaning in connection with an action within the original jurisdiction of the United States Supreme Court, and hence Rule 4(e) cannot be applied analogously to such an action. Simply stated, the United States Supreme Court is not a "Court . . . held within" any particular state. Thus no "long arm" extension of the basic common law rules of personal jurisdiction is applicable in the case at Bar.

10. Congress has not enacted any "long arm" legislation conferring upon the Supreme Court the power

to serve its process outside the territorial boundaries of the United States. Nor does any rule of this Court grant such power.

11. A further distinction it is submitted, ought to be made between those "contacts" which are sufficient to enable an American Court in one state or federal district to obtain personal jurisdiction over a "foreign" corporation incorporated by another American State, and those "contacts" sufficient to enable it to obtain jurisdiction over an "alien" corporation incorporated by a Foreign Sovereign such as the Dominion of Canada.

12. The sales of Dow Chemical of Canada, Limited to American purchasers can be characterized, as involving:

(i) an extremely small proportion of the total sales of Dow Chemical of Canada Limited;

(ii) transactions in which the initiative originated with the American purchaser who was not in any way solicited by representatives of Dow Chemical Company of Canada, Limited;

(iii) offers accepted and hence contracts formed within Canada;

(iv) personal property as to which, under the applicable Canadian law, the title passes in Canada.

13. A "foreign" manufacturer, such as Dow Chemical of Canada, Limited, that fills unsolicited orders received by it from purchasers located within another jurisdiction, by simply shipping goods into that other jurisdiction, without retaining the title to such goods, is not "doing business" within that other jurisdiction, and has an inadequate "contact" with that other jurisdiction to justify the courts of that jurisdiction in as-

suming personal jurisdiction over the "foreign" manufacturer.⁵

14. Where a "foreign" manufacturer, such as Dow Chemical of Canada, Limited, makes a contract of sale by accepting within its own jurisdiction an offer made from outside this jurisdiction, then the contract will be considered as having been made within the jurisdiction in which the manufacturer is located. In such circumstances, either by common law or by statute, the manufacturer will not be considered as having a sufficient "contact" with the jurisdiction of the purchaser to justify the courts of that jurisdiction in taking personal jurisdiction over the manufacturer.⁶

15. Because the sales by Dow Chemical of Canada, Limited to American purchasers constitute merely isolated sales not forming part of a systematic business pattern, they afford an insufficient basis for finding that such business activity could amount to "carrying on business" within the United States.⁷ The decisions

⁵ *Beatty v. M.S. Steel Co.*, 276 F.Supp. 259, 262-4 (D.Md.) 401 F.2d. 157 (4 Cir. 1968), cert. denied 89 S.Ct. 686; *Tetco Metal Products Inc. v. Langham*, 387 F.2d. 721 (5 Cir. 1968); *Lizotte v. The Canadian Johns-Manville Company Limited*, 387 F.2d. 607 (1 Cir. 1967); *McKee Electric Company v. Rauland-Burg Corporation*, 20 N.Y. 2d. 377, 283 N.Y.S. 2d. 34, 229 N.E. 2d. 604 (Ct. App. 1967); *Kramer v. Vogl*, 17 N.Y. 2d. 27, 267 N.Y.S. 2d. 900, 215 N.E. 2d. 159, 161 (Ct. App. 1966).

⁶ *Marshall Egg Transport Company v. Bender-Goodman Company*, 275 Minn. 534, 148 N.W. 2d. 161; *Litsinger Sign Company v. American Sign Company*, 11 Ohio State 2d. 1, 227 N.E. 2d. 609 (Sup. Ct. 1967).

⁷ *Hutchinson v. Chase and Gilbert*, 45 F.2d. 139 (2 Cir. 1930) (Opinion of Learned Hand, J.); *Chunky Corporation v. The Blumenthal Brothers Chocolate Company*, 299 F.Supp. (D.C. N.Y. 1969); *Green v. Equitable Power Manufacturing Company*, 99 F.

of this Court in the two cases of *International Shoe Company* and *Perkins* contain emphasis by the Court upon the importance of "continuous and systematic corporate activities" within the jurisdiction of the forum.⁸

16. Where there is no direct relationship between the facts supporting the cause of action and the factual "contact" between the forum and the foreign corporation, the existing "contacts" must be most extensive. The absence of a direct relationship between the cause of action and "the contacts" is a most relevant factor to be taken into consideration by the Court in determining whether jurisdiction exists.⁹ Both in the *International Shoe Company* case and the *Perkins* case the United States Supreme Court carefully distinguished between the "contacts" sufficient to justify the assumption of jurisdiction in cases where those "contacts" do not constitute the foundation of the cause of action and cases where they do constitute such

Supp. 237, 246 (D.C. Ark. 1951); *Buffalo Belt and Felt Corporation v. Royal Manufacturing Company*, 27 F.2d. 400, 402 (D.C. N.Y. 1928); *Duke v. The Pioneer Mining and Ditch Company*, 280 F. 883 (D.C. Wash. 1922); *Muraco v. Ferentino*, 247 N.Y.S. 2d. 598, 602 (Sup. Ct. 1964). See also: *Velandra v. Regie Nationale Des Usines Renault*, 336 F.2d. 292, 297-8 (6 Cir. 1964) for emphasis on number, value and percentage of sales within the forum state.

⁸ *International Shoe Company v. The State of Washington*, 326 U.S. 310, 318 (1945); *Perkins v. Benguet Consolidated Mining Company*, 342 U.S. 437, 445 (1952).

⁹ *Fisher Governor Company v. The Superior Court of San Francisco*, 53 Cal. 2d. 222, 347 P.2d. 1, 1 Cal. Rptr. 1 (Sup. Ct. in Bank 1959); *Colorado Builders Supply Company v. Hinman Bros. Construction Company*, 304 P. 2d. 892, 896 (Colo. Sup. Ct. in Bank 1956); *Conn. v. I.T.T. Actna Finance Company*, 252 A.2d. 184, 189-90 (R.I. Sup. Ct. 1969).

foundation.¹⁰ In the case at bar, the less than minimal business "contacts" between Dow Chemical of Canada, Limited and the United States involve isolated sales transactions totally unrelated to the nuisance alleged by the Plaintiff.

17. Numerous cases, particularly cases in which a cause of action is based on the negligent manufacture of products outside the forum state by a manufacturer who carries on a sales activity to some extent within the forum state have stressed the importance of this relational factor.¹¹

18. The plaintiff asserting the existence of jurisdiction in the forum state on the basis that the Defendant is carrying on business therein, or on the basis that the Defendant has adequate "contacts" therewith has the burden of proving the existence of the requisite jurisdictional facts.¹²

19. By way of an analogy, this Court has held that the burden of proving the existence of a sufficient

¹⁰ *International Shoe Company v. The State of Washington*, 326 U.S. 310, 318 (1945); *Perkins v. Benguet Consolidated Mining Company*, 342 U.S. 437, 444 (1952).

¹¹ *Eyerly Aircraft Company v. Killian*, 414 F.2d. 591, 597 (5 Cir. 1969); *Deveny v. Rheem Manufacturing Company Limited*, 319 F.2d. 124, 127 (2 Cir. 1963); *Blount v. Peerless Chemicals (P.R.) Inc.*, 316 F.2d 695, 700 (2 Cir. 1963); *B.K. Sweeney Company v. The Colorado Interstate Gas Company*, 429 P.2d. 759, 762 (Okla. Sup. Ct. 1967).

¹² *Lizotte v. The Canadian Johns-Manville Company Ltd.*, 387 F.2d. 607 (1 Cir. 1967); *Smeltzer v. Deere and Company*, 252 F.Supp. 552, 555 (W.D. Pa. 1966); *Detsch and Company v. Calbar Incorporated*, 228 Cal.App.2d. 556, 39 Cal. Rptr. 626, 632 (Dist. Ct. App. 1964); *Young Spring and Wire Corporation v. Smith*, 176 So.2d. 903, 905 (Fla. Sup. Ct. 1965).

monetary sum in controversy to justify the assumption of jurisdiction is upon the party asserting the existence of such jurisdiction.¹³

20. Service of process upon The Dow Chemical Company would not be service of process upon Dow Chemical of Canada, Limited.¹⁴

ARGUMENT NUMBER 2

Can the Original Jurisdiction of the Supreme Court of the United States be Invoked by the Plaintiff With Respect To That Portion of the Prayer for Relief Relating to a Money Decree for Damages?

1. Dow Chemical of Canada, Limited submits this Court lacks original jurisdiction under the Constitution of the United States with respect to that portion of the prayer for relief being asserted by the State of Ohio in its capacity as Trustee for the citizens and inhabitants of Ohio because the State in its own behalf apart from its capacity as Trustee is not a party to these claims as is required by Article III Section 2, Clause 2 of the Constitution of the United States.

2. The claims sought to be asserted in paragraphs 3 and 4 of plaintiff's prayer for relief are, in the case of paragraph 3, capable of being advanced by the State of Ohio only in its capacity as Trustee for the citizens

¹³ *K.V.O.S. Incorporated v. The Associated Press*, 299 U.S. 269, 280 (1936).

¹⁴ *A.G. Bliss Co. v. United Carr Fastener Company of Canada*, 116 F.Supp. 291 (D. Mass. 1953), affirmed 213 F.2d. 541 (1 Cir. 1954); *Blount v. Peerless Chemicals (P.R.) Inc.*, 316 F.2d. 695, 699 (2 Cir. 1963); *Compania Mexicana Refinadora Island v. Compania Metropolitana de Oleoductos S.A. et al.*, 250 N.Y. 20, 164 N.E. 907, 909 (Ct. App. 1928); see by way of analogy *Cannon Manufacturing Company v. Cudahy Packing Company*, 267 U.S. 333, 336, 337 (1925).

and inhabitants of Ohio, and in the case of paragraph 4, are admittedly advanced by the State of Ohio in its capacity as Trustee.

3. It has been stated by this Court that, in order to bring a case within its original jurisdiction, it is not enough that a state is nominally plaintiff when, in reality, the relief sought is on behalf of or for the benefit of particular individuals.¹

4. A damage action brought by a state as Trustee on behalf of its citizens is quite distinct from a *parens patriae* action. As was stated by this Court in *North Dakota v. Minnesota*:²

“The right of a state as *parens patriae* to bring suit to protect the general comfort, health or property rights of its inhabitants threatened by the proposed or continued action of another state, by prayer for injunction, is to be differentiated from its lost power as a sovereign to present and enforce individual claims of its citizens as their Trustee against a sister State.”

5. In that case North Dakota in addition to an injunction sought a decree against Minnesota for damages for itself and for its inhabitants whose farms were injured and whose crops were lost.

6. The Eleventh Amendment to the Constitution forbidding the extension of the judicial power of the United States to any suit in law or equity prosecuted against any one of the United States by citizens of

¹ *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 394, 396; *Hawaii v. Standard Oil Company of California*, 301 F.Supp. 982 (D. Hawaii 1969); *The Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corporation*, 309 F. Supp. 1057 (E.D. Pa. 1969).

² 263 U.S. 365, 375.

another state, or by citizens and subjects of a foreign state was invoked to deny jurisdiction.

7. The reasoning of the Court was that, notwithstanding the naming of the State as plaintiff, the State was maintaining the action as Trustee for its citizens and the Amendment to the Constitution prevented the Court from accepting original jurisdiction with respect to the prayer for a money decree for the damage done to the farms of individuals on whose behalf the State was suing as Trustee.

8. A suit in the name of a State for the benefit of other parties really interested is, for jurisdictional purposes, regarded as a suit by the person for whose benefit it is brought.³

9. In *Oklahoma v. Atchison etc. Railway Company*⁴ this Court stated:

"These doctrines, we think, control this case and require its dismissal as not being within the original jurisdiction of this court as defined by the Constitution. Under a contrary view that jurisdiction could be invoked by a State, bringing an original suit in this court against foreign corporations and citizens of other States, whenever an original suit in this court against foreign corporations and citizens of other States, whenever the State thought such corporations and citizens of other States were acting in violation of its laws to the injury of its people generally or in the aggregate; although, an injury, in violation of law, to the property or rights of particular persons through the action of foreign corporations or citizens of States could be reached, without the intervention of the State, by suits instituted by the

³ *Georgia v. Pennsylvania Railway Co.*, 324 U.S. 439, 446; *Arkansas v. Texas*, 346 U.S. 368, 371.

⁴ 220 U.S. 277, 289.

persons directly or immediately injured. We are of the opinion that the words in the Constitution, conferring original jurisdiction on this Court, in a suit 'in which a State shall be a party', are not to be interpreted as conferring such jurisdiction in every cause in which the State elects to make itself strictly a party plaintiff of record and seeks not to protect its own property, but only to vindicate the wrongs of some of its people or to enforce its own laws or public policy against wrongdoers generally".

10. While it is clear under the Constitution that the Court has jurisdiction to entertain a *parens patriae* action by a State for an injunction to protect its quasi sovereign rights, it should be noted that these *parens patriae* rights are rights possessed by the State separate and distinct from the rights which the individual citizens of the State possess. This *parens patriae* right is analogous to but not the same as the individual's right under the law of torts.⁵ There is no precedent in this Court for the recovery of monetary damages in a *parens patriae* suit.⁶

11. In this case where the State of Ohio is suing as Trustee to recover damages on behalf of its citizens it asserts the rights of its citizens, under the law of torts, the measure of damages being those damages suffered by the citizens, and it is only a nominal party to the action. The case in that respect is not one in which the state is a party because there is no right of the state *per se* being asserted. Hence, there is no original jurisdiction in the Supreme Court of the United States with respect to that portion of the prayer.

⁵ *Georgia v. Tennessee Copper Company*, 206 U.S. 230, 237.

⁶ *Hawaii v. Standard Oil Company of California*, 301 F. Supp. 982 (D. Hawaii 1969).

ARGUMENT NUMBER 3

Will the Supreme Court of the United States Assume Jurisdiction in an Action Founded on an Alleged Nuisance Where the Alleged Nuisance Was Abated Prior to the Institution of the Action?

1. Dow Chemical of Canada, Limited has complied with the Ministerial Order of the Crown in right of the Province of Ontario prohibiting the discharge of mercury and mercury compounds from its plant into the St. Clair River.¹

2. Any nuisance there may have been has been abated, and remains subject to the continuing jurisdiction of the Crown in right of the Province of Ontario. Injunctive relief is no longer necessary, indeed, the trial of such an issue would be a mere academic exercise.

3. A court will not order injunctive relief for the abatement of a nuisance when the activities constituting the nuisance have already been discontinued without judicial intervention.²

4. Particularly is this so where there is an independent assurance, in the form of the order of a regulatory Commission, (in this instance a Crown agency,

¹ See Appendix VII. and Appendix VI.

² *City of Elizabeth v. Gilchrist*, 86 A. 535 (N.J. Ch. 1912); *Miller v. Edison Electric Illuminating Co.*, 66 A.D. 470, 73 N.Y.S. 376 (App. Div. 1901); *Chamberlain v. Ciaffoni*, 96 A. 2d. 140 (Pa. Sup. Ct. 1953); *Akers v. Mathieson Alkali Works*, 144 S.E. 492, 494 (Va. Sup. Ct. App. 1928); For the principle as related to injunctions outside the "nuisance" context, see: *Mechling Barge Lines v. United States*, 368 U.S. 324 (1961); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953).

the Ontario Water Resources Commission) against the resumption of the discontinued activities.³

5. Specifically, in the case of *Dutton v. Rocky Mountain Phosphate Incorporated*,⁴ the Supreme Court of Montana refused to totally enjoin the defendant from engaging in activities constituting air pollution because the defendant had already installed equipment to reduce the emission of flouride to levels consistent with the emission standards underlying a conditional State Board of Health order for closure of the plant. In the case at bar, Dow Chemical of Canada, Limited has altered its industrial practices to comply with the order of the Ontario Water Resources Commission prohibiting the discharge or introduction of mercury and mercury compounds into the St. Clair River.

6. "It is the duty of this Court to dismiss an original suit in which it cannot make an effective decree. *A fortiori*, it is its duty not to entertain such a suit."⁵

7. "Any injunction which this Court could properly frame must not be an idle gesture. It must be one to prevent the threatened injury."⁶

³ Cf. *Independent News Co. v. Williams*, 404 F.2d. 758, 761 (3 Cir. 1968).

⁴ 450 P. 2d. 672, 677 (Mon. Sup. Ct. 1969).

⁵ *Georgia v. Pennsylvania Railway Co.*, 324 U.S. 439, 487 (1945).

⁶ *Ibid.*

ARGUMENT NUMBER 4**Will the Supreme Court of the United States Assume Jurisdiction in a Matter Where There May Exist Doubt as to Its Ability To Enforce Its Judgment?**

1. In this case there is a prayer for extra-territorial injunctive relief. Dow Chemical of Canada, Limited is not within the territorial limits of the United States of America nor does it have sufficient contacts with the United States of America to enable the Supreme Court of the United States to possess any degree of certainty as to its ability to enforce its own order.

2. Should this Court deem it proper to consider injunctive relief against Dow Chemical of Canada, Limited because of an apprehension of a resumption of activities amounting to a nuisance, the Supreme Court ought to adhere to the well established legal principle that no Court will make an order which it does not have the ability to enforce because such an order tends to bring the orders of the Court into disrepute.¹

3. The Supreme Court of the United States would not, in fact, have power to enforce an order requiring a Canadian corporation to take or desist from a particular course of action carried on within the boundaries of Canada. In the converse situation of an action brought before the Courts of Ontario to enjoin activities amounting to a nuisance and carried on within one of the United States of America by a resident thereof, a Canadian Court would not provide injunctive relief

¹ *State ex rel. Watkins v. North American Land & Timber Co. Limited*, 31 S. 172, 176-177 (La. Sup. Ct. 1902); see 32 C.J. 75 and 43 C.J.S. 459.

to the plaintiff by reason of the inability of the Canadian Court to enforce its order.²

4. It is possible for a successful litigant to bring an action in the Courts of Ontario seeking by way of relief the enforcement of the judgment of the Court of the foreign jurisdiction.³

5. A Court of the British Commonwealth, however, will not enforce a foreign injunctive decree.⁴

6. The Courts of Ontario will not enforce "long arm" jurisdiction even if they would themselves have similar statutory jurisdiction in a comparable factual situation.⁵

7. The leading case setting out the common law rules for the recognition of foreign judgments by the Ontario Courts is *Emmanuel v. Symon*:⁶

² *Attorney General v. The Niagara Falls International Bridge Co.* (1873), 20 Grant's Ch. 490, 514-16. See also *Marshall v. Marshall* (1888), 38 Ch. D. 330 (C.A.); *Kinahan v. Kinahan* (1890), 45 Ch. D. 78.

³ See 8 Canadian Encyclopedic Digest (2nd. ed.) 383-4.

⁴ See: Dicey & Morris, *THE CONFLICT OF LAWS*, 1017-19 (8th ed. 1967) where it is stated at 1019: "If, however, the judge [of a foreign court] orders [the defendant] to do anything [other than pay money], e.g. specifically perform a contract, it will not support an [enforcement] action [in the forum] though it may be *res judicata*." See also: Wolff, *PRIVATE INTERNATIONAL LAW*, Section 243 (2nd. ed. 1950) and see *Gauthier v. Routh* (1843), 6 UCQB (O.S.) 602, 607.

⁵ *Re Trepea Mines Ltd.* [1960], 1 W.L.R. 1273, 1281; *Societe Cooperative Sidmetal v. Titan International Ltd.* [1966], 1 Q.B. 828; *Sharpes Commercials Ltd. v. Gas Turbines Ltd.* [1965], N.Z.L.R. 819; *Bainford et al. v. Newell-Roberts* [1962], I.R. 95.

⁶ [1908] 1 K.B. 302, 309 (C.A.).

"In actions *in personam* there are five cases in which the courts of the country will enforce a foreign judgment:

- (1) where the defendant is a subject of the foreign country in which the judgment has been obtained;
- (2) where he was resident in the foreign country when the action began;
- (3) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued;
- (4) where he has voluntarily appeared; and
- (5) where he has contracted to submit to the forum in which the judgment was obtained."

8. It is a principle of United States Law that a Court will not grant an injunction where the defendant is beyond the jurisdiction and the act sought to be enjoined or done is an act performed or to be performed outside the jurisdiction of the Court of whom the relief is requested.⁷

9. It is submitted that in addition to the International Joint Commission, a proper forum for seeking injunctive relief is the Supreme Court of Ontario to which jurisdiction Dow Chemical of Canada, Limited is subject.

⁷ *Mississippi & Missouri Railroad Company v. Ward*, 2 Black (67 U.S.) 485, 492-494 (1862); *McGowan et al. v. Columbia River Packers Association et al.*, 219 F. 365, 373-377 (9 Cir. 1914), *affirmed* 245 U.S. 352, 357-358 (1917); *Gilbert v. The Moline Water Power and Manufacturing Company*, 19 Iowa 319 (1866); *Gunter v. Arlington Mills*, 171 N.E. 486 (Mass. Sup. Jud. Ct. 1930); *Western Union Telegraph Co. v. Pacific and A. Telegraph Co.*, 49 Ill. 90 (1868); *Gaines v. Farmer*, 55 Tex. Civ. A. 601, 119 S.W. 874, 878 (1909); *Royal Fraternal Union v. Lundy*, 51 Tex. Civ. A. 637, 113 S.W. 185, 187 (1908).

ARGUMENT NUMBER 5

Will the Supreme Court of the United States Assume Jurisdiction Where the Relief Requested Is Incapable of Enforcement by Reason of Its Lacking in Certainty and by Reason of the Trust Sought to be Created Being Lacking in Certainty?

1. A decree in the character of a mandatory injunction requiring anyone to remove mercury and mercury compounds from Lake Erie presumes the existence of a means of doing so which has hitherto been unknown to science.

2. This impliedly has been conceded by the State of Ohio in its request for damages as an alternative relief. In their brief the inclusion of the phrase "If found to be feasible" constitutes a candid acknowledgment of ignorance on the part of the State of Ohio as to the existence of any method of accomplishment.

3. It is submitted that this Court ought not to grant a mandatory injunction without clear proof that it is possible or "feasible" to comply with the Court's order. A defendant ought not to be required to do an impossible or an impracticable thing.

4. It further presupposes that failing the existence of a feasible method, the Court will order the creation of a trust which offends the rules respecting certainty and must, therefore, fail as a matter of law.

5. The trust specified in the complaint of the State of Ohio would be void because:

- (a) it is uncertain as to the event or time of vesting;
- (b) it is uncertain as to the class of beneficiaries; (here the State of Ohio would appear to wish to be Trustee for all persons interested in Lake

Erie and would include the State of Ohio, Michigan, Pennsylvania, New York, the United States of America, the Province of Ontario and the Dominion of Canada, and all the inhabitants and citizens of these sovereign and quasi-sovereign states present and future)

- (c) it is uncertain as to whether or not it will ever vest in anyone.

ARGUMENT NUMBER 6

Does the 1909 (Boundary Waters) Treaty Provide the Mechanism for Investigating and If Necessary Adjudicating Upon Controversies Involving the Great Lakes?

1. Article IX of the Treaty contemplates the production of a report by the Commission which is expressly characterized as not amounting to a decision or arbitral award. By way of contrast Article X of the 1909 Treaty provides for a binding decision either by the Commission in the case of a majority opinion, or, in cases where the Commission is unable to produce a majority decision, by an umpire selected in accordance with the 1907 Hague Convention for the pacific settlements of international disputes.

2. Article X which provides for the settlement of matters of difference arising between the High Contracting Parties involving the rights, obligations, or interests of the United States or of the Dominion of Canada, either in relation to each other or to their respective inhabitants, is to be invoked "by the consent of the two parties". This is in contrast to Article IX which may be invoked by either of the Sovereign States independent of each other.

3. Article XII of the Treaty provides for the rendering of technical assistance to the Commission as

well as for the empowering of the Commission to administer oaths and take evidence on oath.

4. The International Joint Commission has, by virtue of the 1909 Treaty, been invested with adequate power to deal with all matters respecting pollution of the Great Lakes, and in such a case the judicial system ought to defer to the administrative quasi-judicial apparatus specifically created for dealing with the particular controversy.¹

5. Especially is this so where any adjudication on the manner or feasibility of removing mercury or mercury compounds from Lake Erie must necessarily affect the health and welfare of all persons adjacent or downstream from any such removal attempt. (e.g. dredging.) In particular the Governments of Canada and the Province of Ontario and the citizens thereof are persons necessarily affected by any order this Court

¹ *Z. F. Assets Realization Corporation v. Hull*, 31 F. Supp. 371, affirmed 114 F.2d. 464, certiorari granted 311 U.S. 632, affirmed 311 U.S. 470; *GMO Nicklaus & Co. v. The United States*, 373 F.2d. 944, 957 (Ct. Cl.); *Hannevig v. The United States*, 84 F. Supp. 743 (Ct. Cl. 1949); see also the reference to the Supreme Court's exhaustion of remedies principle in *The Original Jurisdiction of the United States Supreme Court*, 11 *STANFORD LAW REVIEW* 665, 687, footnote 145: "In suits between states, as in normal equity practice, before leave to file will be granted, or even considered, the complaining state must show the application has been made to the defendant state for correction of the grievance. Consequently, it is the practice of litigant states to allege that they have exhausted all extralegal remedies before bringing suit. See Motion for Leave To File a Complaint, p. 32, *California v. Washington*, 358 U.S. 64 (1958). The requirement is satisfied either by these unsuccessful efforts, cf. *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 236 (1907) (dictum), or continued authorization by the state legislature of the acts complained of. *New York v. New Jersey*, 256 U.S. 296 (1921); *Louisiana v. Texas*, 176 U.S. 1, 22-23 (1900). See also *Missouri v. Illinois*, 180 U.S. 208, 210 (1901)."

may make requiring such removal. They are accordingly indispensable parties to this suit while at the same time they are beyond the reach of the jurisdiction of this Court.² Where essential parties to a suit are absent and beyond the reach of the jurisdiction of this Court, this Court ought not to assume jurisdiction.³

6. For over half a century the International Joint Commission has proved to be a dynamic and invaluable mechanism for investigating problems concerning pollution of the Great Lakes and has consequently been utilized by the American and Canadian Governments as the primary and appropriate institution for dealing with Great Lakes pollution problems.

7. The International Joint Commission has proved itself an effective adjudicative body when directed to deal with damage claims arising out of pollution matters with international ramifications.⁴

² *Oster v. Dominion of Canada*, 144 F. Supp. 746 (N.D. N.Y. 1956) *affirmed* 238 F.2d 400 (2 Cir. 1956) *cert. denied* 353 U.S. 936 (1957).

³ *Minnesota v. Northern Securities Co.*, 184 U.S. 199, 235-238, 245-7 (1902); *Arizona v. California*, 298 U.S. 558, 571-2 (1936).

⁴ Decision of the Trail Smelter Arbitral Tribunal, 35 AM. J. INT'L LAW 684 (1941), discussed in (1963) 1 CANADIAN YEAR BOOK OF INTERNATIONAL LAW 213.

ARGUMENT NUMBER 7

Should the Supreme Court of the United States Assume Jurisdiction in a Case Involving Delicate International Questions of Political Sensitivity and Complex Questions of Fact Where the Two Sovereign Governments Concerned Have Established and Empowered a Specialized Agency (The International Joint Commission)?

1. Dow Chemical of Canada, Limited has complied with the Ministerial Order of the Crown in right of the Province of Ontario prohibiting the discharge of mercury and mercury compounds from its plant into the St. Clair River.¹

2. Thus, any nuisance has been abated with the result that the injunctive relief requested by the plaintiff is unnecessary. There remains outstanding the claim for damages as Trustee together with the claim for a mandatory decree with an alternative claim for damages in lieu thereof.

3. It is submitted that the disposition of these latter claims is one which properly lies within the jurisdiction of the International Joint Commission.

4. It is submitted that this is so simply because they alone are in a position to represent and weigh the combined and the sometimes competing interests of the several interested sovereign and quasi-sovereign states.

5. It is not only those states which border on Lake Erie that are affected. The entire Great Lakes drainage basin may well be the subject of the total concern.

6. The International Joint Commission alone is in a position to marshal the very considerable amount of

¹ See Appendix VII. and Appendix VI.

technical assistance necessary to assess and evaluate the following very complex issues of fact and law:

- (i) What are the sources of mercury contamination in the Great Lakes and what is their nature and character? To resolve this problem, an enquiry must be made into:
 - (a) a consideration of water flows and drainage basins and pollution generally in Lake Superior, Lake Michigan and Lake Huron, as well as Lake St. Clair, the St. Clair River and the Detroit River and Lake Erie;
 - (b) a consideration of other sources of mercury, both natural and pollutive on both sides of the international boundary between the United States and Canada.
- (ii) What valid concern is there with respect to mercury pollution? To resolve this problem an enquiry must be made into:
 - (a) a consideration of the multi-varied micro-organisms as might possess the capacity to convert metallic mercury into methyl mercury and their presence in the Great Lakes drainage basin;
 - (b) a consideration of the flow patterns that might conduct the contaminated material from one area of one of the Great Lakes to another;
 - (c) a consideration of the ecological factors affecting various species of fish;
 - (d) a consideration of the toxicological aspects of mercury and its compounds

and in particular its effect on human beings following their consumption of fish known to have ingested by some metabolic process mercury in one of its various forms;

- (e) a consideration of the weight to be attached to mercury pollution in the overall context of an already polluted Lake Erie.
- (iii) What immediate measures should be taken to resolve this problem? To resolve this problem an enquiry must be undertaken into:
- (a) a consideration of the consequences that may flow directly or indirectly from any and all alternative procedures with particular reference to the rights of the citizens and inhabitants of those Provinces and States situated down stream along the shores of the Niagara River, Lake Ontario and the St. Lawrence River;
 - (b) a consideration of the overall co-ordination and integration of such remedial steps with those steps already underway to resolve the existing problems of pollution in Lake Erie;
 - (c) a consideration of and an apportionment of the costs of such a program as part of a larger program to eliminate pollution generally in Lake Erie and an apportionment of these costs in terms of the extent to which any one person may be found to have caused or contributed to the problems of pollution generally.

7. "As Mr. Justice Holmes put it:

'Before this court ought to intervene the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all considerations on the other side.' *Missouri v. Illinois*, *supra*, 200 U.S. at 521. Indeed, so awkward and unsatisfactory is the available litigious solution for these problems that this Court deemed it appropriate to emphasize the practical constitutional alternative provided by the Compact Clause. Experience led us to suggest that a problem such as that involved here is 'more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court however constituted.' *New York v. New Jersey*, *supra*, at 313."²

8. "A mandatory injunction should never be granted when its enforcement will require too great an amount of supervision by the court. It needs no citation of authorities to sustain this proposition. It is a fundamental principle and of general application in this and other jurisdictions."³

² *Dyer v. Simms*, 341 U.S. 22, 27 (1951).

³ *McCabe et al. v. Watt et al.*, 73 A. 453, 455 (Pa. Sup. Ct. 1909); *Johnson v. Lancaster*, 266 S.W. 565, 569 (Tex. Civ. App. 1924); *Cameron et al. v. City of Carbondale*, 76 A. 198, 199 (Pa. Sup. Ct. 1910).

ARGUMENT NUMBER 8

Does Anyone Other Than the Government of the United States of America Have a Right To Enforce the Boundary Waters Treaty of 1909?

1. The proposed complaint of the plaintiff alleges a violation of the 1909 (Boundary Waters) Treaty by Dow Chemical of Canada, Limited.

2. Only the Government of the United States of America as one of the High Contracting Parties under the 1909 (Boundary Waters) Treaty would be entitled as a matter of *International Law* to enforce obligations created by the 'Treaty. The State of Ohio would have no such right. The applicable principle is put tersely in the leading English language text on the subject, Lord McNair's *The Law of Treaties*.¹

“A treaty creates obligations between the contracting parties solely, that is, the contracting states (or more popularly, their Governments), and not between one party and the nationals of another, or between the nationals of two or more parties”.

Similarly, Clive Parry comments:²

“It is . . . useless to attempt to specify what precise rights a treaty may confer and what obligations they impose. But these must be rights or obligations of an international person in international law”.

¹ 2nd. ed., 1961, at 322.

² *The Law of Treaties*, ch. 4 of MANUAL OF PUBLIC INTERNATIONAL LAW 220 (M. Sorensen ed., 1968).

CONCLUSION

Because :

- (i) The Supreme Court of the United States does not possess *in personam* jurisdiction over Dow Chemical of Canada, Limited;
- (ii) The State of Ohio is not a "party" other than in its capacity as Trustee for its citizens with respect to its claims for damages;
- (iii) The Supreme Court of the United States ought not to assume original jurisdiction in an action on an alleged nuisance where the nuisance has already been abated;
- (iv) The Supreme Court of the United States ought not to assume original jurisdiction where there exists doubt as to its ability to enforce its judgment;
- (v) The Supreme Court of the United States ought not to assume original jurisdiction where the relief:
 - (a) is incapable of enforcement because it is lacking in certainty; or
 - (b) requires the Court to embark upon speculative assessments and the creation of Trusts which are themselves incapable of certainty;
- (vi) The 1909 (Boundary Waters) Treaty provides the mechanism for investigating and adjudicating upon the controversies involving pollution of the Great Lakes and in particular of Lake Erie;

- (vii) The Supreme Court of the United States ought not to assume original jurisdiction where there exists a specialized agency such as the International Joint Commission;
- (viii) Only the United States of America has the right in International Law to enforce the Treaty of 1909;

it is respectfully submitted that the application by the State of Ohio for leave to file a complaint ought to be denied.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

RICHARD W. GALIHER,
1215 Nineteenth Street, N. W.
Washington, D. C. 20036,
U.S.A.

IAN W. OUTERBRIDGE, Q.C.
VINCENT K. McEWAN,
WARREN H. MUELLER,
120 Adelaide Street West,
Toronto, Ontario,
Canada.

Counsel for
Dow Chemical of Canada, Limited.

APPENDIX I**ARTICLE III**

...

SECTION 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before-mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

...

APPENDIX II**UNITED STATES CODE
TITLE 28**

SECTION 1251, B—The Supreme Court shall have original jurisdiction of: . . .

(3) all actions or proceedings by a State against the citizens of another State or against aliens.

APPENDIX III

TREATY WITH THE UNITED STATES RELATING TO BOUNDARY WATERS AND QUESTIONS ARISING ALONG THE BOUNDARY BETWEEN CANADA AND THE UNITED STATES, SIGNED AT WASHINGTON, JANUARY 11, 1909.

Treaty relating to Boundary Waters and Questions arising along the Boundary between Canada and the United States, signed at Washington, January 11, 1909.

HIS Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, and the United States of America, being equally desirous to prevent disputes regarding the use of boundary waters and to settle all questions which are now pending between the United States and the Dominion of Canada involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along their common frontier, and to make provision for the adjustment and settlement of all such questions as may hereafter arise, have resolved to conclude a Treaty in furtherance of these ends, and for that purpose have appointed as their respective Plenipotentiaries:

His Britannic Majesty, the Right Honourable James Bryce, O.M., his Ambassador Extraordinary and Plenipotentiary at Washington; and

The President of the United States of America, Elihu Root, Secretary of State of the United States;

Who, after having communicated to one another their full powers, found in good and due form, have agreed upon the following Articles:—

Preliminary Article.

For the purposes of this Treaty boundary waters are defined as the waters from main shore to main shore of

the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary between the United States and the Dominion of Canada passes, including all bays, arms, and inlets thereof, but not including tributary waters which in their natural channels would flow into such lakes, rivers, and waterways, or waters flowing from such lakes, rivers, and waterways, or the waters of rivers flowing across the boundary.

ARTICLE 1.

The High Contracting Parties agree that the navigation of all navigable boundary waters shall for ever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels, and boats of both countries equally, subject, however, to any laws and regulations of either country, within its own territory, not inconsistent with such privilege of free navigation, and applying equally and without discrimination to the inhabitants, ships, vessels, and boats of both countries.

It is further agreed that so long as this Treaty shall remain in force this same right of navigation shall extend to the waters of Lake Michigan, and to all canals connecting boundary waters and now existing or which may hereafter be constructed on either side of the line. Either of the High Contracting Parties may adopt rules and regulations governing the use of such canals within its own territory, and may charge tolls for the use thereof; but all such rules and regulations and all tolls charged shall apply alike to the subjects or citizens of the High Contracting Parties and the ships, vessels, and boats of both of the High Contracting Parties, and they shall be placed on terms of equality in the use thereof.

ARTICLE 2.

Each of the High Contracting Parties reserves to itself, or to the several State Governments on the one side and the Dominion or Provincial Governments on the other, as

the case may be, subject to any Treaty provisions now existing with respect thereto, the exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of all waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters; but it is agreed that any interference with or diversion from their natural channel of such waters on either side of the boundary resulting in any injury on the other side of the boundary shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs; but this provision shall not apply to cases already existing or to cases expressly covered by special agreement between the parties hereto.

It is understood, however, that neither of the High Contracting Parties intends by the foregoing provision to surrender any right which it may have to object to any interference with or diversions of waters on the other side of the boundary the effect of which would be productive of material injury to the navigation interests on its own side of the boundary.

ARTICLE 3.

It is agreed that, in addition to the uses, obstructions, and diversions heretofore permitted or hereafter provided for by special agreement between the Parties hereto, no further or other uses or obstructions or diversions, whether temporary or permanent, of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line, shall be made except by authority of the United States or the Dominion of Canada within their respective jurisdictions and with the approval, as hereinafter provided, of a Joint Commission, to be known as the International Joint Commission.

The foregoing provisions are not intended to limit or interfere with the existing rights of the Government of the United States on the one side and the Government of the Dominion of Canada on the other, to undertake and carry on governmental works in boundary waters for the deepening of channels, the construction of breakwaters, the improvement of harbours, and other governmental works for the benefit of commerce and navigation, provided that such works are wholly on its own side of the line and do not materially affect the level or flow of the boundary waters on the other, nor are such provisions intended to interfere with the ordinary use of such waters for domestic and sanitary purposes.

ARTICLE 4.

The High Contracting Parties agree that, except in cases provided for by special agreement between them, they will not permit the construction or maintenance on their respective sides of the boundary of any remedial or protective works or any dams or other obstructions in waters flowing from boundary waters or in waters at a lower level than the boundary in rivers flowing across the boundary, the effect of which is to raise the natural level of waters on the other side of the boundary, unless the construction or maintenance thereof is approved by the aforesaid International Joint Commission.

It is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other.

ARTICLE 5.

The High Contracting Parties agree that it is expedient to limit the diversion of waters from the Niagara River so that the level of Lake Erie and the flow of the stream shall not be appreciably affected. It is the desire of both Parties

to accomplish this object with the least possible injury to investments which have already been made in the construction of power plants on the United States' side of the river under grants of authority from the State of New York, and on the Canadian side of the river under licenses authorized by the Dominion of Canada and the Province of Ontario.

So long as this Treaty shall remain in force, no diversion of the waters of the Niagara River above the Falls from the natural course and stream thereof shall be permitted except for the purposes and to the extent hereinafter provided.

The United States may authorize and permit the diversion within the State of New York of the waters of the said river above the Falls of Niagara, for power purposes, not exceeding in the aggregate a daily diversion at the rate of 20,000 cubic feet of water per second.

The United Kingdom, by the Dominion of Canada or the Province of Ontario, may authorize and permit the diversion within the Province of Ontario of the waters of said river above the Falls of Niagara for power purposes, not exceeding in the aggregate a daily diversion at the rate of 36,000 cubic feet of water per second.

The prohibitions of this Article shall not apply to the diversion of water for sanitary or domestic purposes, or for the service of canals for the purposes of navigation.

ARTICLE 6.

The High Contracting Parties agree that the St. Mary and Milk Rivers and their tributaries (in the State of Montana and the Provinces of Alberta and Saskatchewan) are to be treated as one stream for the purposes of irrigation and power, and the waters thereof shall be apportioned equally between the two countries, but in making such equal apportionment more than half may be taken from one river and less than half from the other by either

country so as to afford a more beneficial use to each. It is further agreed that in the division of such waters during the irrigation season, between the 1st of April and 31st of October inclusive, annually, the United States is entitled to a prior appropriation of 500 cubic feet per second of the waters of the Milk River, or so much of such amount as constitutes three-fourths of its natural flow, and that Canada is entitled to a prior appropriation of 500 cubic feet per second of the flow of St. Mary River, or so much of such amount as constitutes three-fourths of its natural flow.

The channel of the Milk River in Canada may be used at the convenience of the United States for the conveyance, while passing through Canadian territory, of waters diverted from the St. Mary River. The provisions of Article 2 of this Treaty shall apply to any injury resulting to property in Canada from the conveyance of such waters through the Milk River.

The measurement and apportionment of the water to be used by each country shall from time to time be made jointly by the properly-constituted reclamation officers of the United States and the properly-constituted irrigation officers of His Majesty under the direction of the International Joint Commission.

ARTICLE 7.

The High Contracting Parties agree to establish and maintain an International Joint Commission of the United States and Canada composed of six Commissioners, three on the part of the United States appointed by the President thereof, and three on the part of the United Kingdom appointed by His Majesty on the recommendation of the Governor in Council of the Dominion of Canada.

ARTICLE 8.

This International Joint Commission shall have jurisdiction over and shall pass upon all cases involving the use

or obstruction or diversion of the waters with respect to which under Articles 3 and 4 of this Treaty the approval of this Commission is required, and in passing upon such cases the Commission shall be governed by the following rules or principles which are adopted by the High Contracting Parties for this purpose:—

The High Contracting Parties shall have, each on its own side of the boundary, equal and similar rights in the use of the waters hereinbefore defined as boundary waters.

The following order of precedence shall be observed among the various uses enumerated hereinafter for these waters, and no use shall be permitted which tends materially to conflict with or restrain any other use which is given preference over it in this order of precedence:—

1. Uses for domestic and sanitary purposes;
2. Uses for navigation, including the service of canals for the purposes of navigation;
3. Uses for power and for irrigation purposes.

The foregoing provisions shall not apply to or disturb any existing uses of boundary waters on either side of the boundary.

The requirement for an equal division may in the discretion of the Commission be suspended in cases of temporary diversions along boundary waters at points where such equal division cannot be made advantageously on account of local conditions, and where such diversion does not diminish elsewhere the amount available for use on the other side.

The Commission in its discretion may make its approval in any case conditional upon the construction of remedial or protective works to compensate so far as possible for the particular use or diversion proposed, and in such cases may require that suitable and adequate provision, approved by the Commission, be made for the protection and

indemnity against injury of any interests on either side of the boundary.

In cases involving the elevation of the natural level of waters on either side of the line as a result of the construction or maintenance on the other side of remedial or protective works or dams or other obstructions in boundary waters or in waters flowing therefrom or in waters below the boundary in rivers flowing across the boundary, the Commission shall require, as a condition of its approval thereof, that suitable and adequate provision, approved by it, be made for the protection and indemnity of all interests on the other side of the line which may be injured thereby.

The majority of the Commissioners shall have power to render a decision. In case the Commission is evenly divided upon any question or matter presented to it for decision, separate reports shall be made by the Commissioners on each side to their own Government. The High Contracting Parties shall thereupon endeavour to agree upon an adjustment of the question or matter of difference, and if an agreement is reached between them, it shall be reduced to writing in the form of a Protocol and shall be communicated to the Commissioners, who shall take such further proceedings as may be necessary to carry out such agreement.

ARTICLE 9.

The High Contracting Parties further agree that any other questions or matters of difference arising between them involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along the common frontier between the United States and the Dominion of Canada, shall be referred from time to time to the International Joint Commission for examination and report, whenever either the Government of the United States or the Government of the Dominion of Canada shall request that such questions or matters of difference be so referred.

The International Joint Commission is authorized in each case so referred to examine into and report upon the facts and circumstances of the particular questions and matters referred, together with such conclusions and recommendations as may be appropriate, subject, however, to any restrictions or exceptions which may be imposed with respect thereto by the terms of the reference.

Such reports of the Commission shall not be regarded as decisions of the questions or matters so submitted either on the facts or the law, and shall in no way have the character of an arbitral award.

The Commission shall make a joint report to both Governments in all cases in which all or a majority of the Commissioners agree, and in case of disagreement the minority may make a joint report to both Governments, or separate reports to their respective Governments.

In case the Commission is evenly divided upon any question or matter referred to it for report, separate reports shall be made by the Commissioners on each side to their own Government.

ARTICLE 10.

Any questions or matters of difference arising between the High Contracting Parties involving the rights, obligations, or interests of the United States or of the Dominion of Canada, either in relation to each other or to their respective inhabitants, may be referred for decision to the International Joint Commission by the consent of the two Parties, it being understood that on the part of the United States any such action will be by and with the advice and consent of the Senate, and on the part of His Majesty's Government with the consent of the Governor-General in Council. In each case so referred, the said Commission is authorized to examine into and report upon the facts and circumstances of the particular questions and matters referred, together with such conclusions and recommendations as may be appropriate, subject, however, to any

restrictions or exceptions which may be imposed with respect thereto by the terms of the reference.

A majority of the said Commission shall have power to render a decision or finding upon any of the questions or matters so referred.

If the said Commission is equally divided, or otherwise unable to render a decision or finding as to any questions or matters so referred, it shall be the duty of the Commissioners to make a joint report to both Governments, or separate reports to their respective Governments, showing the different conclusions arrived at with regard to the matters or questions so referred, which questions or matters shall thereupon be referred for decision by the High Contracting Parties to an Umpire chosen in accordance with the procedure prescribed in the fourth, fifth, and sixth paragraphs of Article 45 of The Hague Convention for the pacific settlement of international disputes, dated the 18th October, 1907. Such Umpire shall have power to render a final decision with respect to those matters and questions so referred on which the Commission failed to agree.

ARTICLE 11.

A duplicate original of all decisions rendered and joint reports made by the Commission shall be transmitted to and filed with the Secretary of State of the United States and the Governor-General of the Dominion of Canada, and to them shall be addressed all communications of the Commission.

ARTICLE 12.

The International Joint Commission shall meet and organize at Washington promptly after the members thereof are appointed and when organized the Commission may fix such times and places for its meetings as may be necessary, subject at all times to special call or direction by the two Governments. Each Commissioner, upon the first joint meeting of the Commission after his appointment,

shall, before proceeding with the work of the Commission, make and subscribe a solemn declaration in writing that he will faithfully and impartially perform the duties imposed upon him under this Treaty, and such declaration shall be entered on the records of the proceedings of the Commission.

The United States' and Canadian sections of the Commission may each appoint a Secretary, and these shall act as joint Secretaries of the Commission at its joint sessions, and the Commission may employ engineers and clerical assistants from time to time as it may deem advisable. The salaries and personal expenses of the Commission and of the Secretaries shall be paid by their respective Governments, and all reasonable and necessary joint expenses of the Commission incurred by it shall be paid in equal moieties by the High Contracting Parties.

The Commission shall have power to administer oaths to witnesses and to take evidence on oath whenever deemed necessary in any proceeding, or inquiry, or matter within its jurisdiction under this Treaty, and all parties interested therein shall be given convenient opportunity to be heard, and the High Contracting Parties agree to adopt such legislation as may be appropriate and necessary to give the Commission the powers above mentioned on each side of the boundary, and to provide for the issue of subpoenas and for compelling the attendance of witnesses in proceedings before the Commission. The Commission may adopt such rules of procedure as shall be in accordance with justice and equity, and may make such examination in person and through agents or employees as may be deemed advisable.

ARTICLE 13.

In all cases where special agreements between the High Contracting Parties hereto are referred to in the foregoing Articles, such agreements are understood and intended to include not only direct agreements between the High Contracting Parties, but also any mutual arrangement

between the United States and the Dominion of Canada expressed by concurrent or reciprocal legislation on the part of Congress and the Parliament of the Dominion.

ARTICLE 14.

The present Treaty shall be ratified by His Britannic Majesty and by the President of the United States of America, by and with the advice and consent of the Senate thereof. The ratifications shall be exchanged at Washington as soon as possible, and the Treaty shall take effect on the date of the exchange of its ratifications. It shall remain in force for five years, dating from the day of exchange of ratifications, and thereafter until terminated by twelve months' written notice given by either High Contracting Party to the other.

In faith whereof the respective Plenipotentiaries have signed this Treaty in duplicate and have hereunto affixed their seals.

Done at Washington, the 11th day of January, in the year of our Lord one thousand nine hundred and nine.

(L.S.) JAMES BRYCE.

(L.S.) ELIHU ROOT.

The above Treaty was approved by the United States' Senate on the 3rd March, 1909, with the following Resolutions:—

Resolved,—That the Senate advise and consent to the ratification of the Treaty between the United States and Great Britain, providing for the settlement of international differences between the United States and Canada, signed on the 11th day of January, 1909.

Resolved further (as a part of this ratification),—That the United States approves this Treaty with the understanding that nothing in this Treaty shall be construed as

affecting, or changing, any existing territorial, or riparian rights in the water, or rights of the owners of lands under water, on either side of the international boundary at the rapids of the St. Mary's River at Sault Ste. Marie, in the use of the waters flowing over such lands, subject to the requirements of navigation in boundary waters and of navigation canals, and without prejudice to the existing right of the United States and Canada, each to use the waters of the St. Mary's River, within its own territory; and further, that nothing in this Treaty shall be construed to interfere with the drainage of wet, swamp, and overflowed lands into streams flowing into boundary waters, and that this interpretation will be mentioned in the ratification of this Treaty as conveying the true meaning of the Treaty, and will in effect, form part of the Treaty.

PROTOCOL OF EXCHANGE.

On proceeding to the exchange of the ratifications of the treaty signed at Washington on January 11, 1909, between Great Britain and the United States, relating to boundary waters and questions arising along the boundary between the United States and the Dominion of Canada, the undersigned plenipotentiaries duly authorized thereto by their respective Governments, hereby declare that nothing in this treaty shall be construed as affecting, or changing, any existing territorial, or riparian rights in the water, or rights of the owners of lands under water, on either side of the international boundary at the rapids of St. Mary's River at Sault Ste. Marie, in the use of the waters flowing over such lands, subject to the requirements of navigation in boundary waters and of navigation canals, and without prejudice to the existing right of the United States and Canada, each to use the waters of the St. Mary's River, within its own territory; and further, that nothing in this treaty shall be construed to interfere with the drainage of wet, swamp and overflowed lands into streams flowing into boundary waters, and also that this declaration shall be

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deemed to have equal force and effect as the treaty itself and to form an integral part thereto.

The exchange of ratifications then took place in the usual form.

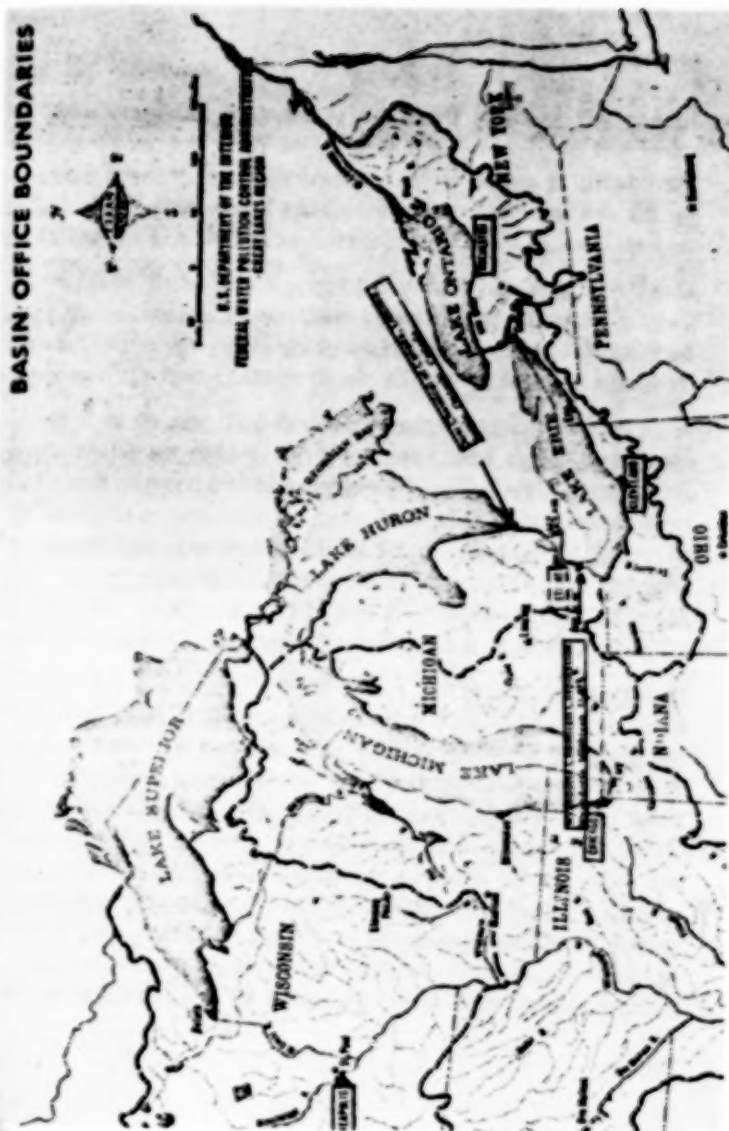
In witness whereof, they have signed the present Protocol of Exchange and have affixed their seals thereto.

Done at Washington this 5th day of May, one thousand nine hundred and ten.

JAMES BRYCE, (Seal.)

PHILANDER C. KNOX, (Seal.)

APPENDIX IV



APPENDIX V

[SEAL OF THE PROVINCE OF ONTARIO]

PRIME MINISTER OF ONTARIO

Toronto, Ontario,
May 15, 1970.

Dear Mr. Thomas:

I have received your letter of April 9 about the recent problem of mercury affecting fish, particularly in the Lake St. Clair area. The Government of Ontario is most concerned about this and I can assure you that we are doing all we can to see that it is corrected as quickly as possible.

I want to take this opportunity to give you the facts about the situation as we now know them. This is a very new and different problem in environmental pollution and we are finding that there is much still to be learned about it.

Methyl mercury, the organic compound of mercury, is known to be an extremely poisonous and dangerous substance and as such has always been handled with great care. The inorganic compounds and elemental or metallic mercury itself are also known to be toxic, but only if taken in much larger amounts. Until recently it was not thought that metallic mercury could be a pollutant or that it could enter the food chain and affect fish and wildlife.

There are a wide variety of uses of mercury and mercury compounds and it would just not be possible to provide a complete list. In some cases, methyl mercury is used for treating seed grains and for controlling fungus growth in golf course grasses. Its use for seed treatment has been declining as it is being replaced by less dangerous chemicals. The major industrial users of metallic mercury are certain chemical plants manufacturing chlorine and caustic soda. These factories represent the most significant potential source of mercurial contamination of water. A less significant contribution is made by pulp mills using organic

mercury compounds to inhibit the growth of slime on their processing equipment. Steps have now been taken by both these industries to prevent mercury losses in their operations. Minor amounts of mercury may also occur in effluents from municipal sewage treatment plants as a result of industrial and domestic use of products containing mercury although so far no traceable amounts have been found in tests we have made.

In the years between 1953 and 1960, and again in 1965, deaths and serious neurological disorders occurred in Japan among people who had eaten fish and shellfish contaminated by methyl mercury discharged from an organic chemical plant. Because of the decline in numbers of seed-eating birds, Sweden banned the use of methyl mercury for seed dressing in 1966 and also took steps to restrict discharges of metallic mercury from industrial plants.

These events prompted concern among authorities in Canada about the effects of mercury in the environment and in 1968 provincial and federal agencies began studies on it. Because of the general lack of knowledge in this field, new techniques had to be developed to detect the presence of mercury. In Ontario, it was confirmed in August, 1969, that the bottom sediments of the St. Clair River contained high levels of mercury, although the significance and source were unknown. Concern was intensified in September by the hunting ban imposed on upland game birds in Alberta, because the birds had accumulated significant quantities of mercury, presumably from treated seed grain. This was followed by the discovery of high levels of mercury in fish from Lake Winnipeg and a significant source of contamination was determined to be a chloralkali chemical plant located on the Saskatchewan River.

This prompted an investigation of fish and wildlife in the Lake St. Clair area by the Ontario Water Resources Commission, the Department of Lands and Forests, and the federal Department of Fisheries and Forestry through

its Fisheries Research Board. Fish samples were dispatched to a laboratory in California for testing, and late in March mercury levels in excess of .5 P.P.M. were confirmed. The federal department immediately impounded fish from this area and a ban was placed on their export. At the same time, high levels of mercury were found in fish taken from Clay Lake, on the Wabigoon River, downstream from Dryden.

After receiving this information, immediate action was taken by Ontario to request the federal government to place a fishing ban, both commercial and angling, on the following waters: the St. Clair River, Lake St. Clair, the Detroit River and part of the Wabigoon River, including Clay Lake. All companies known to be using mercury in their industrial processes were placed under Ministerial Order to take action to halt any release of mercury in plant effluents. I am told that action was immediately taken by the companies involved.

In discussions between the federal government and ourselves on methods of compensating fishermen, we agreed that the two governments would share equally in the cost of providing cash advances to fishermen pending the outcome of their efforts to obtain compensation for losses from the firms responsible for the pollution. A federal-provincial committee was established to work out details of this program.

An intensive program of testing has been undertaken by the Ontario Water Resources Commission and the federal Fisheries laboratory at Winnipeg. Arrangements are being made by federal officials to establish temporary testing facilities at Wheatley, Ontario, so that a continuous monitoring program can be undertaken on fish from the affected area. The O.W.R.C. will be carrying out a wide-ranging program of testing to see if any other areas of the province are affected.

Discussions have also been held with officials of the States of Michigan and Ohio and machinery is being established to ensure effective co-ordination with remedial programs carried on in these jurisdictions. We hope these contacts will lead to much wider co-operation in pollution problems in the Great Lakes.

It is quite apparent that the Government has moved quickly and decisively to correct this unfortunate and regrettable occurrence. It is to be hoped that action has been taken before great harm was done and that the sources of contamination will be eliminated. There would not appear to be anything to be gained by taking retaliatory measures against polluting industries, although civil actions by those directly affected may be instituted. It is much more important that everyone concerned work together to rectify the situation as quickly as possible.

I want to thank you for letting me have your views on this important subject and for giving me an opportunity to present the facts of the matter to you. I hope you will find this explanation of the situation helpful.

Yours very truly,

"JOHN P. ROBERTS"
John P. Roberts.

Mr. G. A. M. Thomas,
City Clerk,
City of Sarnia,
Ontario.

APPENDIX VI

(SEAL OF THE ONTARIO WATER RESOURCES COMMISSION)

I, George A. Kerr, Minister of Energy and Resources Management, hereby approve pursuant to Section 50 of The Ontario Water Resources Commission, Act, R.S.O. 1960, Chapter 281 as amended, the Requirements and Direction of the Ontario Water Resources Commission hereunder.

"GEORGE A. KERR"
George A. Kerr

THE ONTARIO WATER RESOURCES COMMISSION

Considering that DOW CHEMICAL OF CANADA LIMITED owns and operates an industrial establishment for the production of caustic soda and chlorine that includes two plants known as "Chlorine I" and "Chlorine III" at Sarnia, Ontario, using as raw material brine from local salt deposits, whose operations are substantially similar;

And considering that the electrolytic processes in these plants utilize mercury as an electrode and in a variety of ways such plants release mercury that is a source of contamination of the environment;

And considering that the Company also owns and operates as part of its industrial establishment aforesaid a further plant known as "Chlorine II" that uses an electrolytic process not founded upon the utilization of mercury but that such plant draws its salt brine from salt deposits underlying the establishment and that salt deposits are subject to a measure of contamination from sludge and spent brine reintroduced into such deposits from plants "Chlorine I" and plant "Chlorine III", with the result that plant "Chlorine II" may indirectly become a source of mercury contamination of the environment;

And considering that the Commission is of the opinion that the arrangements of any industrial establishment for

the collection, transmission, treatment or disposal of its sewage are unsatisfactory if mercury is released in any quantity at all to the environment;

And considering that the Commission, by communications to Dow Chemical of Canada Limited dated February . . , 1970, advised Dow Chemical of Canada Limited that it must take immediate steps to eliminate any discharge of mercury from its establishment to the water environment.

HEREBY REQUIRES you, DOW CHEMICAL COMPANY OF CANADA LIMITED, pursuant to the provisions of Section 50 of The Ontario Water Resources Commission Act, R.S.O. 1960, chapter 281:-

I. To make investigations and submit reports to the Commission in respect of the collection, transmission, treatment or disposal of sewage as it may from time to time direct, and without limiting the generality of the foregoing,

to investigate by sampling, analysis and flow measurement all liquid effluent streams discharging from plants Chlorine I, Chlorine II and Chlorine III and to report to the Commission on the mercury content of such effluent streams on the 1st and 15 of every month hereafter commencing the 15th day of April, 1970, until otherwise directed by the Commission.

II. To install, construct or arrange such facilities for the collection, transmission, treatment or disposal of your sewage as may be directed from time to time by the Commission, and without limiting the generality of the foregoing, on or before the 15th day of April, 1970, or on or before such later date as the Commission may designate, in the event of your applying on or before the 10th day of April, 1970, for designation by it of a later date:-

(1) to assure that all mercury contaminated condensate from hydrogen coolers, not returned to process, is treated for removal of mercury;

(2) to provide facilities to ensure that mercury-contaminated brine is not discharged to the environment under any circumstances. Such facilities may include surge tanks to store and, thus, prevent the discharge of brine under upset or shut-down and start-up conditions. In addition, all equipment such as valves, flanges and pump seals should be put in a state of repair, or if necessary replaced, to eliminate the possibility of any brine discharging due to leaks;

(3) to isolate all floor trenches, drains and sumps that may receive mercury, with resultant contamination of water so that the mercury collected therein, or water contaminated thereby, is treated and/or returned to process.

(4) to handle all sludges resulting from treatment of brine that may contain mercury so as to eliminate the possibility of the release of mercury to the environment;

(5) to dispose of any drying agent used to dry chlorine containing mercury, whether such disposal be to waste or to re-use, in such a way that no mercury will be released to the environment.

III. To maintain, keep in repair and operate such facilities as may be directed from time to time by the Commission.

DATED at Toronto this 26th day of March, 1970.

ONTARIO WATER RESOURCES COMMISSION

"D. J. COLLINS"

Chairman

"D. S. CAVERLY"

General Manager.

APPENDIX VII

ONTARIO WATER RESOURCES COMMISSION

(SEAL)

135 St. Clair Ave. W.
Toronto 7, Ontario
Tel. 365-6975

Water Management in Ontario

May 13, 1970.

Mr. L. M. Tod, Manager,
Environmental Quality Control,
Dow Chemical of Canada Limited,
SARNIA, Ontario.

Dear Sir:

Re: Ministerial Order of March 26, 1970

This is to advise you that compliance with Sections I and II of this order has been executed by your Company. Section III of the order, referring to the maintenance of treatment facilities in a good state of repair and operating condition, will of course remain in effect.

With regard to the frequency of reporting under Section I of the order, it is our view that such reports should now be submitted on a monthly basis commencing June 1st, 1970. This could be included in your regular monthly analyses report.

Yours truly,

"D. P. CAPLICE"

D. P. Caplice, *P. Eng.*,

Director,

Division of Industrial Wastes.

INDEX

	Page
CITATIONS	ii
BRIEF AMICUS CURIAE	1
Statement of Interest in the Motion	2
Jurisdiction	3
The Subject Matter is Appropriate for the Exercise of Jurisdiction	3
Lack of an Appropriate Alternative Forum	4
Conclusion	6
CERTIFICATE OF SERVICE	6

CITATIONS

Cases:	Page
<i>Georgia v. Pennsylvania R.R.</i> (1945), 324 U.S. 439	5
<i>Georgia v. Tennessee Copper Co.</i> (1907), 206 U.S. 230	3
<i>Michigan v. Wisconsin</i> (1926), 270 U.S. 295	4
<i>Michigan v. Wisconsin</i> (1926), 272 U.S. 398	4
<i>Missouri v. Illinois</i> (1901), 180 U.S. 208	3, 4
<i>New Jersey v. City of New York</i> (1931), 283 U.S. 473	4
<i>New York v. New Jersey</i> (1921), 256 U.S. 296	3
<i>North Dakota v. Minnesota</i> (1923), 263 U.S. 365	3
<i>Pennsylvania v. Wheeling and Belmont Bridge Co.</i> (1851) 54 U.S. (13 How.) 556	3
<i>Postal Telegraph Cable Co. v. Alabama</i> (1894), 155 U.S. 482	5
<i>Wisconsin v. Illinois</i> (1929), 278 U.S. 426	4
<i>Wisconsin v. Illinois</i> (1930), 281 U.S. 179	4
Other:	
Constitution of the United States, Article III, Section 2, Clause 2	3
United States Supreme Court Rule 42(4)	2
28 U.S.C. §1251	3

**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1969**

No. 41, ORIGINAL

STATE OF OHIO, EX REL., PAUL W. BROWN,
Attorney General of Ohio, State House Annex,
Columbus, Ohio 43215,

Plaintiff,

v.

WYANDOTTE CHEMICALS CORPORATION, A corpora-
tion existing under the laws of Michigan, located at 1609
Biddle Avenue, Wyandotte, Michigan,

and

DOW CHEMICAL COMPANY OF CANADA, LIMITED,
A corporation existing under the laws of the Dominion
of Canada, located at Sarnia, Ontario, Canada,

and

THE DOW CHEMICAL COMPANY, A corporation exist-
ing under the laws of Delaware, located at Midland,
Michigan,

Defendants.

**BRIEF OF THE STATE OF MICHIGAN
AS AMICUS CURIAE IN SUPPORT OF
MOTION FOR LEAVE TO FILE COMPLAINT**

This is a brief amicus curiae by the State of Michigan
by its Attorney General, Frank J. Kelley, in favor of a

Motion for Leave to File a Complaint by the State of Ohio against a Michigan corporation, a Delaware corporation and a Canadian corporation. This brief amicus curiae is brought pursuant to Supreme Court Rule 42(4) without the express consent of the parties. The State of Michigan concedes that this brief amicus curiae supporting the State of Ohio comes late. The State of Michigan presents this brief amicus curiae upon the information and belief that the Defendants have been given an extended time for reply to the State of Ohio's Motion and, thus, also to this brief. The State of Michigan notified Defendants to this effect by letters dated July 15, 1970. Advanced typewritten copies of this brief amicus curiae were mailed to the Defendants on July 16, 1970.

STATEMENT OF INTEREST IN THE MOTION

The State of Michigan urges this Court to grant the State of Ohio's Motion for Leave to File a Complaint. The State of Michigan is firmly convinced that this Court's jurisdiction in the case rests on a sound, fundamental basis. Additionally, the State of Michigan believes that only this Court can render the quality of judgment which best serves the needs of the Great Lakes community as a whole. Acceptance of jurisdiction will wisely respond to that need.

Particularly, the State of Michigan is increasingly concerned with the ecological balance and well-being of all the natural resources which comprise the Great Lakes. Michigan's concern is easily understood. It is the only state whose entire population and territory lie within the Great Lakes Basin. Not surprisingly, Michigan holds in trust the largest portion of the Great Lakes waters, fish, vege-

tation and bottomlands. This trusteeship extends to Lakes Superior, Michigan, Huron, St. Clair and Erie.

JURISDICTION

This is an action brought by a state against citizens of other states. Judicial power and original jurisdiction in this case are vested in this Court by virtue of Article III, Section 2, Clause 2 of the Constitution of the United States and Title 28 U.S.C., Section 1251.

THE SUBJECT MATTER IS APPROPRIATE FOR THE EXERCISE OF JURISDICTION

Nuisance abatement has long been a subject matter which this Court has accepted under original jurisdiction. *Missouri v. Illinois* (1901), 180 U.S. 208 (sewage pollution of the Mississippi River Basin). *New York v. New Jersey* (1921), 256 U.S. 296 (sewage pollution of New York harbor area). *North Dakota v. Minnesota* (1923), 263 U.S. 365 (hazardous drainage into interstate waters).

Furthermore, original jurisdiction has been allowed to states seeking to abate nuisances caused by citizens of other states. In the case of *Pennsylvania v. Wheeling and Belmont Bridge Co.* (1851), 54 U.S. (13 How.) 556, this Court took cognizance of Pennsylvania's claim that a bridge built by a Virginia bridge company was a public nuisance because it obstructed navigation on the Ohio River. In the case of *Georgia v. Tennessee Copper Co.* (1907), 206 U.S. 230, the Court again took cognizance of an action to abate a nuisance causing air pollution. Mr. Justice Holmes speaking for the Court in that case said:

The caution with which demands of this sort, on the part of a State, for relief from injuries analogous to torts, must be examined, is dwelt upon in *Missouri v. Illinois*, 200 U.S. 429, 420, 521. But it is plain that some such demands must be recognized, if the grounds alleged are proved. When the States by their union made the forcible abatement of outside nuisance impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining *quasi-sovereign* interests; and the alternative to force is a suit in this court. *Missouri v. Illinois*, 180 U.S. 208, 241. (at 237)

In the case of *New Jersey v. City of New York* (1931), 283 U.S. 473, this Court heard New Jersey's claim that New York City's practice of deep sea garbage disposal constituted a public nuisance.

In addition, this Court has exercised original jurisdiction over a number of water diversion and water boundary disputes. *Wisconsin v. Illinois* (1929), 278 U.S. 426 and (1930), 281 U.S. 179, and *Michigan v. Wisconsin* (1926), 270 U.S. 295 and (1926), 272 U.S. 398 are but two examples relating to the Great Lakes. The State of Michigan realizes that the State of Ohio is making no such claims. However, Ohio's complaint has boundary and water law implications which, according to our federal system, should be tried in a federal forum.

LACK OF AN APPROPRIATE, ALTERNATIVE FORUM

Central to this Court's cognizance of claims under original jurisdiction is the lack of an appropriate, adequate

alternative forum. *Georgia v. Pennsylvania R.R.* (1945), 324 U.S. 439, 464.

The appropriateness and the need for federal judicial guidance is as apparent as the vastness of the Great Lakes Basin and its attendant problems. The Basin itself stretches the length of America's industrial heartland. Nearly one fourth of the nation's manufactured goods are produced in this region. Over thirty million Americans make their homes and livelihoods within this region. These citizens reside in eight states. All but one of the Great Lakes forms a major boundary between the United States of America and the Dominion of Canada.

The inherent interstate, indeed international, character of the Great Lakes cannot be minimized. Legal developments—especially of a precedent setting nature—are of interest to all who live within the Basin. This interest on the part of states is augmented by the frank admission that the neglect of the Great Lakes is due in large part to the neglect of states to advocate and formulate a solid body of common law which fits experiences unique to great lakes (as opposed to rivers).

Only a federal forum can appropriately and impartially consider the interstate and international implications of this litigation. But this Court in *Postal Telegraph Cable Co. v. Alabama* (1894), 155 U.S. 482, 487 stated:

A State is not a citizen. And, under the Judiciary Acts of the United States, it is well settled that a suit between a state and a citizen or a corporation of another State is not between citizens of different States; and that the Circuit Court [now district court] of the United States has no jurisdiction of it, unless it arises

under the Constitution, laws or treaties of the United States. *Ames v. Kansas*, 111 U.S. 449; *Stone v. South Carolina*, 117 U.S. 430; *Germania Ins. Co. v. Wisconsin*, 119 U.S. 473.

Thus, without a 'federal question' Ohio cannot bring its suit under normal federal district jurisdiction. There is a considerable doubt that Ohio's complaint arises under the Constitution, laws or treaties of the United States.

CONCLUSION

Original jurisdiction is necessary and proper for the efficient, speedy and just resolution of the issues raised by Ohio's Complaint. Therefore, the State of Ohio's Motion for Leave to File a Complaint should be granted.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

M. Robert Carr
Assistant Attorney General

July, 1970

CERTIFICATE

I, Robert A. Derengoski, Solicitor General of the State of Michigan and a member of the Bar of the Supreme Court of the United States, hereby certify that on July 16, 1970, I served typewritten copies of the foregoing Brief Amicus

Curiae on the defendants by mailing typewritten copies in a duly addressed envelope with proper postage pre-paid to: J. Donald McLeod, DAHLBERG, MALLENDER and GAWNE, 1022 Ford Building, Detroit, Michigan 48226, attorney for defendant Wyandotte Chemical Corporation; Milton Kunen, KAYE, SCHOLER, FIERMAN, HAYS and HANDLER, 425 Park Avenue, New York, New York 10022; Harley J. McNeal, MCNEAL and SCHICK, 520 Williamson Building, Cleveland, Ohio 44114, attorneys for defendant Dow Chemical; and Paul W. Brown, Attorney General, State of Ohio, Columbus, Ohio 43215.

Robert A. Derengoski /s/
Solicitor General
State of Michigan
Lansing, Michigan 48913

FILE COPY

No. 41, ORIGINAL

Supreme Court, U.S.

FILED

AUG 25 1970

E. ROBERT CLARK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1969

STATE OF OHIO, EX REL., PAUL W. BROWN,
Attorney General of Ohio, State House Annex,
Columbus, Ohio 43215,

v.

Plaintiff,

WYANDOTTE CHEMICALS CORPORATION, A corporation ex-
isting under the laws of Michigan, located at 1609
Biddle Avenue, Wyandotte, Michigan,

and

DOW CHEMICAL COMPANY OF CANADA, LIMITED, A cor-
poration existing under the laws of the Dominion of
Canada, located at Sarnia, Ontario, Canada,

and

THE DOW CHEMICAL COMPANY, A corporation existing
under the laws of Delaware, located at Midland,
Michigan,

Defendants.

BRIEF OF THE STATE OF OHIO IN SUPPORT OF
THE MOTION FOR LEAVE TO FILE COMPLAINT

PAUL W. BROWN
Attorney General of Ohio
State House Annex
Columbus, Ohio 43215

INDEX

	Page
SUMMARY OF ARGUMENTS	vii
INTRODUCTION	1
ARGUMENT I	4
ARGUMENT II	11
ARGUMENT III	16
ARGUMENT IV	25
CONCLUSION	29
APPENDIX I	1a
APPENDIX II	8a
APPENDIX III	10a
APPENDIX IV	12a
APPENDIX V	14a
APPENDIX VI	15a

TABLE OF CASES

<i>Arizona Copper Co. Ltd. v. Gillespie</i> , 230 U.S. 46 (1913)	7
<i>Attorney Gen. v. Jamaica Pond Aqueduct Corp.</i> , 133 Mass. 361, 8 N.E. 140 (1882)	7
<i>Baker v. Carr</i> , 369 U.S. 186 (1962)	18, 19
<i>A. G. Bliss v. United Carr Fastener Co. of Canada</i> , <i>Ltd.</i> , 116 F. Supp. 291 (1953)	15
<i>California Dev. Co. v. New Liverpool Salt Co.</i> , 172 F. 792 (1909)	11, 16
<i>Camp v. Boyd</i> , 229 U.S. 530 (1913)	7
<i>Coleman v. Miller</i> , 307 U.S. 433 (1939)	19
<i>Continental Ore Co. v. Union Carbide and Carbon</i> <i>Corp.</i> , 370 U.S. 690 (1962)	11
<i>Coosaw Mining Co. v. South Carolina</i> , 144 U.S. 550 (1892)	7

	Page
<i>County of St. Clair v. Lovington</i> , 90 U.S. (23 Wall.) 46 (1874)	4
<i>Edson v. Crangle</i> , 62 Ohio St. 49, 62 (1900), 56 N.E. 647	4
<i>Florida v. Mellon</i> , 273 U.S. 12 (1927)	11
<i>Ford v. U.S.</i> , 273 U.S. 593 (1927)	11
<i>Georgia v. Pennsylvania R.R. Co.</i> , 324 U.S. 439 (1945)	8, 9
<i>Georgia v. Tennessee Copper Co.</i> , 206 U.S. 230 (1907)	7, 8, 9, 10, 18
<i>H. P. Welch Co. v. New Hampshire</i> , 306 U.S. 79 (1939)	23
<i>Hartford Accident & Indem. Co. v. Southern Pac. Co.</i> , 273 U.S. 207 (1927)	7
<i>Hill v. Florida</i> , 325 U.S. 538 (1945)	23
<i>Hilton v. Guyot</i> , 159 U.S. 113 (1895)	17
<i>Hines v. Davidowitz</i> , 312 U.S. 52 (1941)	21, 23
<i>Illinois Cent. R.R. v. Illinois</i> , 146 U.S. 387 (1892) ..	5
<i>In re Debs</i> , 158 U.S. 564, 592 (1895)	6, 7
<i>Lamar v. U.S.</i> , 240 U.S. 60 (1916)	11
<i>Martin v. Lessee of William Waddell</i> , 41 U.S. (16 Pet.) 367 (1842)	4
<i>Massachusetts v. Mellon</i> , 262 U.S. 447 (1923)	10, 17
<i>Massachusetts v. Missouri</i> , 308 U.S. 1 (1939)	10
<i>Massey-Harris-Ferguson, Ltd. v. Boyd</i> , 242 F.2d 800 (1957)	15
<i>McCready v. Virginia</i> , 94 U.S. 391, 394 (1876)	4, 5
<i>Missouri v. Illinois</i> , 180 U.S. 208 (1901)	6, 9
<i>New Jersey v. City of New York</i> , 283 U.S. 473 (1931)	6, 7, 9, 12
<i>North Dakota v. Minnesota</i> , 263 U.S. 365 (1923) ..	9
<i>Ohio v. Cleveland & Pittsburg R.R. Co.</i> , 94 Ohio St. 61, 113 N.E. 677 (1916)	5
<i>Ohio ex rel. Atty Gen. v. Dayton & S.E. R.R. Co.</i> , 36 Ohio St. 434 (1881)	7
<i>Oklahoma v. Atchison, T. & S. F. R.R. Co.</i> , 220 U.S. 277 (1911)	9
<i>Oklahoma v. Gulf, Colo. & S. F. Ry.</i> , 220 U.S. 290 (1911)	10

INDEX—Continued

iii

	Page
<i>Pennsylvania v. Nelson</i> , 350 U.S. 497 (1956)	23
<i>Pennsylvania v. West Virginia</i> , 262 U.S. 553 (1923)	9
<i>Pennsylvania v. Wheeling & Belmont Bridge Co.</i> , 54 U.S. (13 How.) 518 (1851)	7
<i>Pennsylvania R.R. Co. v. Public Serv. Comm'n.</i> , 250 U.S. 566 (1919)	23
<i>People v. Truckee Lumber Co.</i> , 116 Cal. 397, 48 P. 374 (1897)	7
<i>People ex rel. McColgan v. Bruce</i> , 129 F.2d 421 (1942)	16
<i>Pigeon River Improvement, Slide & Broom Co. v. Charles W. Cox, Ltd.</i> , 291 U.S. 138 (1934)	21
<i>Pollard's Lessee v. Hagan</i> , 44 U.S. (13 How) 212 (1845)	4
<i>Port of Seattle v. Oregon & Wash. R.R.</i> , 255 U.S. 56 (1921)	6, 9
<i>Reid v. Covert</i> , 354 U.S. 1 (1957)	20
<i>Ricaud v. American Metal Co. Ltd.</i> , 246 U.S. 304 (1918)	17
<i>Rice v. Santa Fe Elevator Corp.</i> , 331 U.S. 218 (1947)	21, 23
<i>Sanitary Dist. of Chicago v. U.S.</i> , 266 U.S. 405 (1925)	7
<i>State ex rel. Squire v. Cleveland</i> , 150 Ohio St. 303, 82 N.E. 2d 709 (1948)	5
<i>Steele v. Bulova Watch Co., Inc.</i> , 344 U.S. 280 (1952)	12
<i>Strassheim v. Dailey</i> , 221 U.S. 280 (1911)	11
<i>The Cherokee Tobacco</i> , 78 U.S. (11 Wall.) 616 (1870)	21
<i>Trail Smelter Arbitral Decision</i> , 35 Am. J. Int'l L. 684 (1939)	22
<i>U.S. v. Aluminum Co. of America</i> , 148 F. 2d 416 (1945)	11
<i>U.S. v. California</i> , 332 U.S. 19 (1947)	10
<i>U.S. v. Cargill</i> , 389 U.S. 191 (1967)	26, 29
<i>U.S. v. National Lead Co.</i> , 332 U.S. 319 (1947)	12
<i>U.S. v. Oregon</i> , 295 U.S. 1 (1935)	4
<i>U.S. v. Republic Steel Corp.</i> , 362 U.S. 482 (1960) ..	25

	Page
<i>U.S. v. Timken Roller Bearing Co.</i> , 83 F. Supp. 284 (1949)	11
<i>Vanity Mills v. T. Eaton Co.</i> , 234 F. 2d 633 (1956)	11
<i>Whitney v. Robertson</i> , 124 U.S. 190 (1888)	20
<i>Winous Point Shooting Club v. Slaughterbeck</i> , 96 Ohio St. 139, 149, 117 N.E. 162 (1917)	5
<i>Wisconsin v. Illinois</i> , 278 U.S. 367 (1929)	7
<i>Wisconsin v. Pelican Ins. Co.</i> , 127 U.S. 265 (1888) ..	10
<i>Wyandotte Trans. v. U.S.</i> , 389 U.S. 191 (1967) ..26, 27, 28	

CONSTITUTION

Article III, Section 2, Clause 2, United States Con- stitution	8, 21
---	-------

TREATIES

Convention of 1935 with Canada, 49 Stat. 3245 (1935)	22
Treaty Between the United States and Great Britain Relating to Boundary Waters Between the United States and Canada, Dated January 11, 1909, and Proclaimed May 13, 1910, 36 Stat. 2448 (1909)	18, 19, 20, 21, 22, 24, 27

STATUTES

OHIO REV. CODE ANN. § 123.03 (Page 1963)	4
OHIO REV. CODE ANN. § 1531.02 (Page 1963)	4
<i>Federal Rules of Civil Procedure</i> , 28 U.S.C.A. Rules 3, 4 & 65	13, 15, 16
<i>Revised Rules of the Supreme Court of the United States, Part III, Original Jurisdiction</i> , 28 U.S.C.A. Rule 9(2) & 33(i)	13, 15
<i>Rivers and Harbors Act</i> , 33 U.S.C.A. § 409 et seq. (1899)	25, 26
<i>Submerged Lands Act</i> , 43 U.S.C.A. § 1301 et seq. (1953)	4

INDEX—Continued

v

	Page
<i>Water Pollution Control Act</i> , 33 U.S.C.A. § 466 (1948)	19, 20, 23, 24, 27
Act of Congress, approved April 30, 1802; 1 <i>Chase Revised Statutes of Ohio</i> , 70-71	4

BOOKS, TREATISES AND PERIODICALS

Hart & Wechsler, <i>The Federal Courts and the Federal System</i> (1953)	24
Joyce, <i>Treatise on the Laws Governing Nuisance</i> (1906)	6
Wood, <i>The Law of Nuisances</i> (1893)	7
THE FEDERALIST No. 81 (A. Hamilton)	17
<i>The Original Jurisdiction of the United States Supreme Court</i> , 11 <i>STANFORD L. REV.</i> 665 (1959)	8
Waite, <i>The International Joint Commission—Its Practice and Its Impact on Land Use</i> , 13 <i>BUFF. L. REV.</i> 93	22
<i>Restatement of the Foreign Relations Law of the United States Second</i> (1962)	12

SUMMARY OF ARGUMENTS

- I. This Motion to File an Original Action Should be Granted Since the State of Ohio Is the Title Holder to Lake Erie as a Trustee for its Inhabitants and as a Proprietor and Therefore Is the Proper Party Plaintiff to File This Common Law Public Nuisance Action and to Seek the Usual Common Law Remedies Required to Abate the Mercury Pollution of Lake Erie, Which the Supreme Court Has Traditionally Entertained Under its Constitutional Jurisdiction of Original Actions.
 - A. *The State of Ohio Has Title and a Vested Interest in Lake Erie, its Waters, Resources, Underlying Soil and Shores.*
 - B. *The Acts of Defendants, Dow Canada, Wyandotte and Dow U.S., Constitute a Public Nuisance for Which Ohio Has a Common Law Cause of Action Wherein it May Seek a Remedy, Both Legal and Equitable.*
 - C. *The Supreme Court of the United States Is the Proper Forum Under its Original Jurisdiction Involving Controversies Between a State and a Citizen of Another State or Between a State and a Citizen of a Foreign State to Hear Ohio's Complaint Alleging This Public Nuisance.*
- II. The Original Jurisdiction of the Supreme Court Extends to Controversies Whose Subject Matter Exists Within the Territorial Jurisdiction of the United States and After Granting the Motion to File the Complaint the Court Will Determine its Jurisdiction of Those Persons Served With Summons Based Upon Facts Developed by the Parties.
 - A. *The Supreme Court of the United States Has Jurisdiction of the Subject Matter of This Controversy Between Ohio and the Defendant Corporations Since it Involves a Public Nuisance That Exists Within the United States.*
 - B. *The Question of Jurisdiction Over the Person of the Defendants Is not Properly Before the*

Court at This Time Even Though There Are Appropriate Grounds for Service on all Defendants.

III. The Only Appropriate Forum Available to the State of Ohio Is the Supreme Court of the United States and There Is no Restriction or Exclusion of This Court's Constitutionally Founded Jurisdiction by any Federal Treaty, Statute or Judicially Established Doctrine.

A. *The Constitution Provides This Court With Jurisdiction of Original Actions Because it Is the Only Appropriate Forum for States in Actions Against Citizens of Other States or Aliens.*

B. *This Controversy Between Ohio and These Corporate Defendants Is not Controlled by Public International Law and the Poisoning of Lake Erie Cannot be Construed as a "Political Question".*

C. *It Is the Expressed Intent and Policy of the United States Government to Leave Primary Responsibility for Controlling the Pollution of This Country's Waters in the Hands of the States.*

IV. The Supreme Court Has Historically Fashioned Appropriate Relief in Water Pollution and Obstruction Cases Even Though no Federal Common Law Exists and There was no Specific Statutory Authority for Such Relief and in Doing so Has Denied Claims That Federal Statutes and Treaties Provide Exclusive Relief.

A. *Permanent Injunction Against an Obstruction in Waterways.*

B. *Mandatory Injunction to Remove a Vessel From Waterway.*

C. *Damages for Removal.*

D. *Appropriate Relief Is Determined Only After a Full Development of the Facts and in Accordance With Normal Standards of Equity.*

IN THE
Supreme Court of the United States

OCTOBER TERM, 1969

No. 41, ORIGINAL

STATE OF OHIO, EX REL., PAUL W. BROWN,
Attorney General of Ohio, State House Annex,
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Plaintiff,

v.

WYANDOTTE CHEMICALS CORPORATION, A corporation existing under the laws of Michigan, located at 1609 Biddle Avenue, Wyandotte, Michigan,

and

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and

THE DOW CHEMICAL COMPANY, A corporation existing under the laws of Delaware, located at Midland, Michigan,

Defendants.

**BRIEF OF THE STATE OF OHIO IN SUPPORT OF
THE MOTION FOR LEAVE TO FILE COMPLAINT**

INTRODUCTION

This Court is presented with a case which is directed to one of the most serious and specific pollution problems existing in this country. Far from being a "general pol-

lution problem" involving many complex and intricate scientific questions of cause and effect, it relates rather to a specific identifiable pollutant, namely, mercury, which has been admittedly discharged in substantial quantities by Defendants, Wyandotte Chemicals Corporation (hereinafter referred to as "Wyandotte") and Dow Chemical of Canada, Limited, (hereinafter referred to as "Dow Canada"), which is owned and controlled by The Dow Chemical Company (hereinafter referred to as "Dow U.S."), into the water of Lake Erie or tributaries thereto and which is admittedly a poison which has injurious effects upon the environment and ultimately upon human beings. (See Appendix I).

Plaintiff, The State of Ohio (hereinafter referred to as "Ohio"), has alleged in its complaint that the above-mentioned discharge of mercury by Defendants has caused a public nuisance. Defendants, in their briefs, have leaned heavily on factual arguments which are premature. However, Ohio feels compelled to give this Court additional public statements of Defendants which contradict the factual assertions in their briefs and will permit this Court to decide this motion without the distraction of a partial presentation by Defendants. Defendants answer in part that they have "abated" this nuisance. Far from having been abated, the nuisance continues to the injury of wildlife and to the threatened injury of human beings, not only by continuing discharges of the poisonous substances, but also by the mere existence of the great accumulation of mercury deposits in the aquatic environment which are being continuously transformed into poison and introduced into the food chain.

In their briefs, Defendants claim that at the time Ohio filed its motion, they had ceased the discharge of poisonous mercury into the waters of Lake Erie and tributaries thereto. (Brief for Dow Canada, pp. 7-8 and Brief for Wyandotte, pp. 5, 17). These statements not only ignore the substantive aspects of abatement of the nuisance, but

they are also in complete contradiction to statements made by the responsible officials of some of Defendants subsequent to the filing of Ohio's motion on April 28, 1970. For example, Mr. H. D. Doan, President of Dow U.S., speaking at Dow's annual stockholders' meeting on May 6, 1970, stated that discharges of mercury into the St. Clair River were still taking place at the Dow Sarnia plant. (See Appendix II). Mr. C. P. Branch, Executive Vice President of Dow U.S. and a member of the Board of Directors of Dow Canada, reaffirmed this fact in his testimony before the United States Senate Commerce Committee Subcommittee on Energy, Natural Resources and the Environment at a hearing dealing with this mercury pollution held in Mt. Clemens, Michigan, on May 8, 1970. (See Appendix III). Moreover, as previously stated, even if the Defendants cease the discharge of mercury into the aquatic environment, the nuisance still persists because of the contamination heretofore caused by Defendants. Defendants have in effect conceded that they have engaged in a systematic process of dumping a poisonous pollutant into Lake Erie and tributaries thereto over a long period of time.

Ecologists have warned us in the strongest possible terms that time is running short within which our environmental house must be put in order. The recent thermal inversion which blanketed the eastern seaboard is but one example of the clear and present danger. In order to effectively deal with the specific and dangerous pollution problem at hand, this Court must grant Ohio leave to file its Complaint pursuant to this Court's original jurisdiction under article III, section 2, clause 2 of the United States Constitution. Historically, this Court has invoked its original jurisdiction in pollution cases which did not encompass so serious a threat as the instant case.

I. This Motion to File an Original Action Should Be Granted Since the State of Ohio Is the Title Holder to Lake Erie as a Trustee for Its Inhabitants and as a Proprietor and Therefore Is the Proper Party Plaintiff to File This Common Law Public Nuisance Action and to Seek the Usual Common Law Remedies Required to Abate the Mercury Pollution of Lake Erie, Which the Supreme Court has Traditionally Entertained Under Its Constitutional Jurisdiction of Original Actions.

A. *The State of Ohio has Title and a Vested Interest in Lake Erie, Its Waters, Resources, Underlying Soil and Shores.*

1. Ohio, upon its admission to the Union as a sovereign state, acquired title in Lake Erie from the southerly shore to the territorial line of the original Northwest Territory. Act of Congress, Approved April 30, 1802, 1 Chase Revised Statutes of Ohio, 70, 71. *Edson v. Crangle*, 62 Ohio St. 49, 62, 56 N.E. 647 (1900). The interest which Ohio acquired included not only the title to the shores and the soil under this navigable lake, *Martin v. Lessee of William Waddell*, 41 U.S. (16 Pet.) 367 (1842); *County of St. Clair v. Lovington*, 90 U.S. (23 Wall.) 46 (1874); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845), but also the title to the waters ". . . themselves, and the fish in them, so far as they are capable of ownership while running." *McCready v. Virginia*, 94 U.S. 391, 394 (1876). This title ". . . is subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce," *United States v. Oregon*, 295 U.S. 1, 14 (1935), which power was granted to the United States by the respective states in the Constitution, *County of St. Clair v. Lovington*, *supra* at 68. Both Congress and the General Assembly of the State of Ohio have affirmed Ohio's title to Lake Erie, its shores, underlying soil, waters and resources. Submerged Lands Act, 43 U.S.C.A. § 1301 *et seq.* (1953); and Ohio Rev. Code Ann. §§ 123.03 and 1531.02 (Page 1963).

2. The nature of the interest which Ohio holds in Lake Erie is two-fold.

(a) First, "... it is a title different in character from that which the State holds in lands intended for sale It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. . . . The trust . . . is governmental. . . ." *Illinois Central R.R. v. Illinois*, 146 U.S. 387, 452, 455 (1892). The Supreme Court of Ohio has also recognized this governmental or public trust, *Ohio v. Cleveland and Pittsb. R.R. Co.*, 94 Ohio St. 61, 113 N.E. 677 (1916), and has limited its application to navigation, water commerce and fishery. *State ex rel. Squire v. Cleveland*, 150 Ohio St. 303, 82 N.E. 2d 709 (1948). For these three purposes, "... the state is merely the custodian of the legal title, charged with the specific duty of protecting the trust estate and regulating its use. . . ." *Winous Point Shooting Club v. Slaughterbeck*, 96 Ohio St. 139, 149, 117 N.E. 162 (1917). The Supreme Court of the United States in dealing with the fishery aspect, has stated: "For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty. . . . The right which the people of the State thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property right" *McCreedy v. Virginia*, *supra* at 394-95.

(b) Secondly, this title, outside of the realm of navigation, water commerce and fishery, has been classified as a proprietary right of the State. In a case dealing with the navigable waters in the Port of Seattle, Mr. Justice Brandeis stated: "The character of the State's ownership in the land and in the waters is

the full proprietary right." *Port of Seattle v. Oregon & Wash. R.R. Co.*, 255 U.S. 56, 63 (1921).

B. *The Acts of Defendants, Dow Canada, Wyandotte and Dow U.S., Constitute a Public Nuisance for Which Ohio has a Common Law Cause of Action, Wherein it may Seek a Remedy, Both Legal and Equitable.*

1. Defendants, while engaged in the manufacture and processing of products known as caustic soda and chlorine, utilized mercury or compounds thereof and in connection therewith, have continually discharged said mercury or compounds thereof into both the St. Clair River or tributaries thereto and the Detroit River or tributaries thereto, some of which mercury or compounds thereof has flowed or has been carried into Lake Erie across the boundary between Canada and the United States and to and along the Ohio shore. Said discharged mercury or compounds thereof is poisonous and is injurious to the aquatic environment of Lake Erie or tributaries thereto. Moreover, it is potentially injurious and deleterious to the health and safety of the citizens and inhabitants of Ohio. It is a matter of common and general knowledge that mercury and compounds thereof are poisonous and are injurious to health and safety of humans when introduced into the human body. (See Appendix I).

2. These acts, which occurred outside of the territorial limits of the State of Ohio, have damaged and injured the property which the citizens of Ohio hold "in their united sovereignty" and which Ohio also holds in its proprietary capacity. Furthermore, they threaten the health of the citizens of Ohio. Therefore, said acts constitute a common law public nuisance. *In re Debs*, 158 U.S. 564, 592 (1895); *New Jersey v. City of New York*, 283 U.S. 473 (1931); *Missouri v. Illinois*, 180 U.S. 208 (1901). Joyce, *Treatise on the Laws Governing Nuisance*, Section 5, p. 10, Matthew Bender & Co., Albany N.Y. (1906);

Wood, *The Law of Nuisances*, Section 17, pp. 38-39, Bancroft-Whitney Company, San Francisco (1893).

3. In public nuisance cases, the Attorney General is the appropriate official to file a civil action in the name of the State for the benefit of the community as a whole. *Sanitary Dist. of Chicago v. United States*, 266 U.S. 405 (1925); *Coosaw Mining Co. v. South Carolina*, 144 U.S. 550 (1892); *Ohio ex rel. Atty. Gen. v. Dayton & S.E. R.R. Co.*, 36 Ohio St. 434 (1881); *Attorney Gen. v. Jamaica Pond Aqueduct Corp.*, 133 Mass. 361 (1882); *People v. Truckee Lumber Co.*, 116 Cal. 397, 48 P. 374 (1897).

4. The action traditionally entertained by this Court under its constitutional jurisdiction in original actions, and by other courts, is an action in equity to abate the public nuisance. *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1851); *New Jersey v. City of New York*, *supra*; *Wisconsin v. Illinois*, 278 U.S. 367 (1929); *In re Debs*, *supra*; *Arizona Copper Co., Ltd. v. Gillespie*, 230 U.S. 46 (1913). The equity court, in granting the injunction and ordering the abatement of the public nuisance may, when necessary, issue a mandatory order directing that said nuisance be completely removed. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, *supra*; *Ohio ex rel Atty. Gen. v. Dayton & S.E. R.R. Co.*, *supra*.

5. An equity court may grant damages in addition to an injunction in order to give the injured party full relief. This principle is clearly recognized by this Court. In *Camp v. Boyd*, 229 U.S. 530, 551 (1913), this Court stated: "A court of equity ought to do justice completely and not in halves." In *Hartford Accident & Indem. Co. v. Southern Pac. Co.*, 273 U.S. 207, 217-18 (1927), this Court, in granting damages, stated:

Where a court of equity has obtained jurisdiction over some portion of a controversy, it may and will

in general proceed to decide all the issues and award complete relief, even where the rights of parties are strictly legal and the final remedy is of the kind which might be conferred by a court of law.

C. The Supreme Court of the United States Is the Proper Forum Under its Original Jurisdiction Involving Controversies Between a State and a Citizen of Another State or Between a State and a Citizen of a Foreign State to Hear Ohio's Complaint Alleging This Public Nuisance.

1. The Constitution of the United States in article III, section 2, clause 2, provides that the judicial power of the Court shall extend ". . . to controversies between a state and citizen of another state . . . and between a state, or the citizens thereof, and foreign states, citizens or subjects."

2. "The original jurisdiction is confined to civil suits where damage has been inflicted or is threatened" *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 446 (1945). Ohio, in its Complaint, has alleged a common law right of action based upon a public nuisance which has inflicted damage and will continue to inflict damage in the foreseeable future.

3. Ohio, under the public trust doctrine, acts as trustee for all of its citizens in protecting Lake Erie in matters dealing with navigation, commerce and fishery. Where damage to Lake Erie and its fishery has been inflicted and a threat of continued future damage exists, and where the health of the citizens of Ohio is also threatened by the same act, the State of Ohio, as *parens patriae* of its citizens, may take action to redress said injury. *Georgia v. Tennessee Copper Co.*, *supra*; *Georgia v. Pennsylvania R.R. Co.*, *supra*; *The Original Jurisdiction of the United States Supreme Court*, 11 STANFORD L. REV. 665, 671-78 (1959). As this Court has stated: "But it must surely be conceded that, if the health and comfort of the inhabitants of a State are threatened, the State is the

proper party to represent and defend them." *Missouri v. Illinois, supra* at 241.

4. Furthermore, Ohio brings this action in its capacity as proprietor of Lake Erie. Except where limited by the public trust doctrine, it holds title in a proprietary capacity. *Port of Seattle v. Oregon & Wash. R.R., supra*. Because of this injury to its proprietary interest, Ohio may properly seek redress in an original action. *Georgia v. Pennsylvania R.R. Co., supra*; *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923). Unlike the State of Georgia in *Georgia v. Tennessee Copper Co., supra*, Ohio holds title, in both its trustee capacity and its proprietary capacity, to all of the "territory alleged to be affected," and therefore may seek damages as well as an injunction to abate the public nuisance. Mr. Justice Holmes in that case stated at 237: "The alleged damage to the State as a private owner is merely a makeweight" Here, the damage to Ohio is far from a "makeweight". Defendants allege that damage actions are not of the class of cases which are properly presented to this court in original actions. The discussion by Mr. Justice Holmes in *Georgia v. Tennessee Copper Co., supra*, indicates that damages are proper if the proprietary interest of the state is substantial. This Court has permitted complaints praying for damages to be filed in original actions and have dismissed the damage claims only after hearing the case on the merits. *Georgia v. Pennsylvania R.R. Co., supra*; *North Dakota v. Minnesota*, 263 U.S. 365 (1923).

5. Historically this Court has granted states leave to file a complaint in public nuisance cases. *Georgia v. Tennessee Copper Co., supra*; *New Jersey v. City of New York, supra*; *Missouri v. Illinois, supra*. Ohio is not a nominal party plaintiff seeking to enforce the rights of a limited class of its citizens, thus distinguishing the instant case from *North Dakota v. Minnesota, supra*; *Oklahoma v. Atchison, T. & S. F. Ry. Co.*, 220 U.S. 277 (1911). Nor is Ohio seeking to enforce its statutes, like-

wise distinguishing the instant case from *Massachusetts v. Missouri*, 308 U.S. 1 (1939); *Oklahoma v. Gulf, Colo. & S.F. Ry.*, 220 U.S. 290 (1911); *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265 (1888). Thus, the instant action is clearly within "the jurisdictional line of demarcation" of original jurisdiction cases drawn by this Court in *Massachusetts v. Mellon*, 262 U.S. 447, 481-82 (1923), which specifically included cases such as *Georgia v. Tennessee Copper Co.*, *supra*.

6. The Supreme Court of the United States should not refuse leave to file the Complaint because of Defendants' assertion that any relief granted will necessarily be complex, intricate and difficult to enforce. Defendants' assertion involves a premature factual argument. Moreover, Defendants have asserted only that the *general pollution* of Lake Erie comes from many sources and becomes generally mixed and indistinguishable as to source.¹ This case involves a specific identifiable poison which can be easily distinguished from the general pollutants of Lake Erie. In addition, Defendants have presented nothing to show that the remedy will necessarily be intricate or complex. Even if complexities are encountered, this Court has already announced in *U.S. v. California*, 332 U.S. 19, at syl. No. 2 (1947) that:

The fact that the coastal line is indefinite and that its exact location will involve many complexities and difficulties presents no insuperable obstacle to the exercise of the highly important jurisdiction conferred on this Court by Article III, § 2, of the Constitution.

¹ Brief for Dow U.S., p. 7.

"The report to the International Joint Commission on the pollution of Lake Erie, Lake Ontario and the International section of the St. Lawrence River, Vol. 1 (Summary) and Vol. 2 (Lake Erie) (1969), leads to the conclusion that water pollution problems are complex and consequently require an intimate familiarity with scientific and economic facts."

II. The Original Jurisdiction of the Supreme Court Extends to Controversies Whose Subject Matter Exists Within the Territorial Jurisdiction of the United States and After Granting the Motion to File the Complaint the Court Will Determine Its Jurisdiction of Those Persons Served With Summons Based Upon Facts Developed by the Parties.

A. The Supreme Court of the United States has Jurisdiction of the Subject Matter of This Controversy Between Ohio and the Defendant Corporations Since It Involves a Public Nuisance That Exists Within the United States.

1. The federal courts have generally recognized that jurisdiction of the subject matter in an action is not defeated because the action complained of occurred outside the territorial boundaries of the United States. Judge Learned Hand of the Second Circuit Court of Appeals in discussing that court's ability to take cognizance of a Sherman Act violation by a Canadian subsidiary of the Aluminum Company of America stated that: "... it is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize." *U.S. v. Aluminum Co. of America*, 148 F. 2d 416, 443 (1945). See also *Strassheim v. Daily*, 221 U.S. 280 (1911); *Lamar v. U.S.*, 240 U.S. 60 (1916); *Ford v. U.S.*, 273 U.S. 593 (1927); *Vanity Mills v. T. Eaton Co.*, 234 F. 2d 633 (1956); *United States v. Timken Roller Bearing Co.*, 83 F. Supp. 284 (1949), *aff'd* 341 U.S. 593 (1951); *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962); see especially *California Dev. Co. v. New Liverpool Salt Co.*, 172 F. 792 (1909).

2. The Supreme Court of the United States has often stated that the extraterritoriality of an act will not defeat its cognizance of an action when the rights of United

States citizens are affected. In *New Jersey v. City of New York*, *supra* at 482 this Court stated that:

Defendant contends that, as it dumps the garbage into the ocean and not within the waters of the United States or of New Jersey, this Court is without jurisdiction to grant the injunction. But the defendant is before the Court and the property of plaintiff and its citizens that is alleged to have been injured by such dumping is within the Court's territorial jurisdiction. *The situs of the acts creating the nuisance, whether within or without the United States, is of no importance. Plaintiff seeks a decree in personam to prevent them in the future. The Court has jurisdiction. Cf. Massie v. Watts, 6 Cranch 148, 158 et seq. Hart v. Sansom, 110 U.S. 151, 154. Cole v. Cunningham, 133 U.S. 107, 116. Philadelphia Co. v. Stimson, 233 U.S. 605, 622-623. (emphasis added).*

See also *Steele v. Bulova Watch Co., Inc.*, 344 U.S. 280 (1952); *U.S. v. National Lead Co.*, 332 U.S. 319 (1947).

3. Not only have the distinguished courts of the United States stated this principle of extraterritoriality of jurisdiction, but noted scholars have also advanced this principle as sound in logic and practicality. Section 18 of the American Law Institute RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES SECOND (1962), in reference to the bases of jurisdiction states that: "A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if . . .

- (a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems. . . ."

4. Dow Canada has no grounds for asserting that the Supreme Court of the United States has no jurisdiction over the subject matter of this action because Dow Canada

is outside of the territorial limits of the United States. Dow Canada has admittedly released poisonous mercury into the waters leading into Lake Erie within the boundaries of Ohio and the United States. Therefore, this Court clearly has jurisdiction of this action based upon the foregoing generally accepted principles of law and the lines of precedent established by the federal courts, and indeed by the United States Supreme Court itself.

B. The Question of Jurisdiction Over the Person of the Defendants Is Not Properly Before the Court at This Time Even Though There Are Appropriate Grounds for Service on All Defendants.

1. The question of jurisdiction over the person of Defendants can be raised only after the motion now under consideration is granted, the complaint filed and service of process requested. It is premature to argue the merits of the method of personal service used until the Defendants have been served and until the parties have an opportunity to develop all facts upon which such service is based. It is not possible to decide the factual issue posed by Defendants as a matter of law. In any event, the Defendants concede the ease with which jurisdiction can be obtained through personal service on Defendants Dow U.S. and Wyandotte. The only claimed factual issue involves Dow Canada and therefore can not be dispositive of this motion.

2. The Federal Rules of Civil Procedure are made applicable to original actions by the Rules of the Supreme Court of the United States.² The applicable Federal Rules clearly set forth the distinct order of filing the complaint and service of process. Rule 3 provides: "A civil action is commenced by filing a complaint with the court." Rule 4 takes effect only upon the filing of the complaint. This is derived from the language of Rule 4 which specifically

² Revised Rules of the Supreme Court of the United States, Part III, Original Jurisdiction, Rule 9 (2).

states that: "*Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service. . . .*" (emphasis added). Therefore, since Ohio is only seeking leave to file the Complaint in order to commence the action, the Defendants have no basis at this time for questioning this Court's jurisdiction of the person of Dow Canada.

3. The argument about sufficient minimum contacts is a factual argument which may be determined only at that state of the litigation when the facts are developed. Defendants have merely made assertions that the requisite contacts do not exist. Such assertions are not evidence and do not establish facts as required by this Court. Many of these assertions are not even supported by the executives of Dow U.S. and Dow Canada.

- (a) Statements made by C. B. Branch, in his capacity as Executive Vice President of Dow U.S. (See Appendix III), made at the hearings before the Subcommittee on Energy, Natural Resources and the Environment of the United States Senate Commerce Committee, at Mt. Clemens, Michigan, indicate that Dow Canada is not as independent as asserted in the Defendants' briefs. In fact, Dow Canada's presentation regarding this mercury pollution was totally made and controlled by the Executive Vice President and other executives of Dow U.S.
- (b) Statements by H. D. Doan, President of Dow U.S., speaking at Dow's annual stockholders' meeting indicate that Dow U.S. and Dow Canada's management are closely joined (See Appendix II).
- (c) A majority of the Directors of Dow Canada reside in Midland, Michigan (See Appendix IV).
- (d) Dow's 1969 Annual Report shows that Dow Canada does a substantial amount of business in the United States. "*Dow Canada continued to export about 10% of its output, principally to the United States and*

the United Kingdom. . . ." (emphasis added); (See Appendix V). Dow Canada without advising this Court of how much business it actually does in the United States makes self-serving characterizations of the nature of such business as being an "extremely small proportion of total sales of Dow Chemical of Canada, Limited." (Brief for Dow Canada, p. 25). Such a characterization is obviously misleading in light of the statements made in the 1969 Annual Report quoted above.

These published facts verify the fundamental soundness of deciding factual issues at the appropriate procedural point in litigation when the parties have an opportunity to fully develop the facts.

4. The fact that a foreign subsidiary is controlled by a parent corporation within the jurisdiction has previously been enough to satisfy the minimum contacts for jurisdiction of the person. *A. G. Bliss Co. v. United Carr Fastener Co. of Canada, Ltd.*, 116 F. Supp. 291 (1953); *Massey-Harris-Ferguson, Ltd. v. Boyd*, 242 F. 2d 800 (1957), cert. denied 355 U.S. 806 (1957).

5. Rule 33 (i) of the Revised Rules of the Supreme Court of the United States and Rule 4 (d) (3) of the Federal Rules of Civil Procedure provide for service of process on an adverse party. Rule 4 (d) (3) of the Federal Rules of Civil Procedure, which may be implemented in an original action in the Supreme Court, provides that: "Service shall be made as follows: (3) Upon a domestic or foreign corporation . . . by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process. . . ." Defendants allege that Dow Canada would be immune from service under these rules because the Company itself is located in Canada. The Rules, however, do not require service at the offices of the Company. Service need only be made upon one of the persons designated in Rule 4 (d) (3).

6. In any event, even if *in personam* jurisdiction of Dow Canada is not obtained, it would not be fatal to this action. Dow Canada is not an indispensable party and there is no question that this Court can exercise jurisdiction over Dow U.S. and Wyandotte.

7. Dow Canada is admittedly a subsidiary of Dow U.S. and is therefore in active concert with it. Even if Dow Canada cannot be served it would still be subject under Rule 65 (d) of the Federal Rules of Civil Procedure to any injunction which may issue against Dow U.S. Rule 65 (d) provides: "Every order granting an injunction . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them. . . ." Rule 65 (d) will therefore allow this Court to enforce and oversee its orders against Dow Canada. Orders directed to Dow U.S., the sole shareholder of Dow Canada, may effectively direct Dow Canada in its action. *cf. California Dev. Co. v. New Liverpool Salt Co., supra.*

III. The Only Appropriate Forum Available to the State of Ohio Is the Supreme Court of the United States and There Is no Restriction or Exclusion of This Court's Constitutionally Founded Jurisdiction by any Federal Treaty, Statute or Judicially Established Doctrine.

A. The Constitution Provides This Court With Jurisdiction of Original Actions Because It Is the Only Appropriate Forum for States in Actions Against Citizens of Other States or Aliens.

1. It is well-settled that a state, in the absence of an independent federal question, may not maintain a suit based upon a diversity of citizenship against a citizen of another state in the federal district courts.³ Thus, if the

³ Suits by a state against a citizen of another state are not between citizens of different states and therefore there is no diversity jurisdiction under 28 U.S.C. § 1332. *People ex rel. McColgan v. Bruce*, 129 F. 2d 421 (1942) *cert. denied*, 317 U.S. 678 (1942).

sovereign State of Ohio is denied an opportunity to be heard by this Court, it will be relegated to state courts of general jurisdiction. "In cases in which a State might happen to be a party, it would ill suit its dignity to be turned over to an inferior tribunal." *The Federalist* No. 81 (A. Hamilton) at 487. To do so would be inconsistent with the spirit and intent of article III, section 2, clause 2 of the Constitution and with the policy articulated in *Massachusetts v. Mellon*, *supra*, at 480-81 wherein this Court stated that:

The object of vesting in the courts of the United States jurisdiction of suits by one State against the citizens of another was to enable such controversies to be determined by a national tribunal, and thereby to avoid the partiality, or suspicion of partiality, which might exist if the plaintiff State were compelled to resort to the courts of the State of which the defendants were citizens.

B. This Controversy Between Ohio and These Corporate Defendants Is not Controlled by Public International Law and the Poisoning of Lake Erie Cannot Be Construed as a "Political Question."

1. Defendants argue, without authority, that this Court should deny Ohio's motion for leave to file its complaint because principles of international law so dictate. If a question of international law is in fact involved, and there could be such only with respect to one of the Defendants, it would be a private international law question, *Ricaud v. American Metal Co., Ltd.*, 246 U.S. 304 (1918), and, as such, Defendants' argument can be put to rest with the principle announced in *Hilton v. Guyot*, 159 U.S. 113, 163 (1895):

International law, in its widest and most comprehensive sense—including not only questions of rights between nations, governed by what has been appropriately called the law of nations; but also questions arising under what is usually called private interna-

tional law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation—is part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination. (emphasis added).

2. Defendants further argue that, due to the presence of an alien Defendant and the existence of the Boundary Waters Treaty of 1909, 36 Stat. 2448 (1909), this action is placed in the “political question” realm and is therefore not justiciable. The instant action is clearly “justiciable” because the principle followed in *Georgia v. Tennessee Copper Co.*, *supra* is controlling and decisive of the issue now before this Court. No better analysis of the “political question” doctrine can be found than that made by Mr. Justice Brennan in *Baker v. Carr*, 369 U.S. 186, 210-11 (1962). Therein, it was stated:

... it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in light of its nature and posture in the specific case, and of the possible consequence of judicial action. . . .” We have said that ‘In determining whether a question falls within [the political question] category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations.’ (citation omitted) The non-justiciability of a political question is primarily a function of the separation of powers. . . . Deciding whether a matter has in any measure been committed by the Constitution to an-

other branch of the government, . . . is itself a delicate exercise in constitutional interpretation and is a responsibility of this Court as ultimate interpreter of the Constitution.

3. In analyzing the instant case in terms of the standards articulated in *Baker v. Carr*, *supra*, it is at once manifestly clear that this action involves a justiciable question. Certainly the United States Constitution has not committed the authority to abate a public nuisance, created directly and indirectly by domestic corporations, to another department of the federal government; the abatement of a nuisance is indeed susceptible to judicial handling; no international consequences will flow from enjoining the Defendants from poisoning Lake Erie; the political branches of the Government will not be frustrated by Court action in this case, and the United States Government will not be embarrassed abroad by any action this Court may deem proper. *Baker v. Carr*, *supra*; *Coleman v. Miller*, 307 U.S. 433 (1939).

C. It Is the Expressed Intent and Policy of the United States Government to Leave the Primary Responsibility for Controlling the Pollution of This Country's Waters in the Hands of the States.

1. Dow U.S. urges that "this Court has no jurisdiction to adjudicate the issues raised in the proposed litigation sought by Ohio," (Brief for Dow U.S., p. 34), because federal policy, as reflected in the Boundary Waters Treaty of 1909, 36 Stat. 2448 (1909) has determined that the problem of pollution of Lake Erie will be considered only by the International Joint Commission to the exclusion of all state legislation and common law. Nothing could be further from the truth. In the federal Water Pollution Control Act, Congress specifically articulated the role the States are to play with respect to the pollution of this country's waterways⁴:

⁴ See Argument I, A *supra*, pp. 4-6.

. . . it is declared to be the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States in preventing and controlling water pollution. . . . 33 U.S.C.A. § 466 (b) (1948).

Thus, to the extent that the Boundary Waters Treaty of 1909 and the federal Water Pollution Control Act differ with respect to federal policy toward state action in the control, abatement and prevention of water pollution (although it is submitted that they in fact do not), the policy expressed in the Act of Congress, enacted subsequent to the Boundary Waters Treaty of 1909, must take precedent over that which might be said to be implied in the treaty:

This Court has also repeatedly taken the position that an Act of Congress, . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null. *Reid v. Covert*, 354 U.S. 1, 18 (1957), citing, *Whitney v. Robertson*, 124 U.S. 190 (1888).

It is, therefore, submitted that the controlling policy of the United States with respect to the pollution of all its waters is to encourage the states to actively and aggressively avail themselves of whatever means they choose in combating one of the most acute problems faced by contemporary man—environmental pollution. (See Appendix VI)

2. Implicit in the assertion made by Dow U.S. that the International Joint Commission must act as sole and exclusive arbiter with respect to Lake Erie pollution, is the absurd proposition that by the execution of the Boundary Waters Treaty of 1909, the federal government took unto itself all regulatory authority, to be exercised through the International Joint Commission, respecting grievances between private parties which in any way in-

volve the boundary waters.⁵ Although it is without question that the federal government may, if it chooses, regulate matters within the federal domain to the exclusion of the states, it is submitted that the Boundary Waters Treaty of 1909 manifestly fails to reflect a scheme of regulation "so pervasive as to make reasonable the inference that Congress left no room for the state to supplement it" by either legislation or by enforcement of its common law. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). See also, *Hines v. Davidowitz*, 312 U.S. 52 (1941).

3. The cases relied upon by Dow U.S. to support its "exclusivity" argument deal with situations where there was a direct conflict between state law and either the provisions of a treaty or an Act of Congress, and they are, therefore, not only irrelevant to this proposed litigation, but also to the proposition which they are offered as support. To say that there is a conflict between Ohio's efforts to abate a public nuisance, created directly and indirectly by United States corporations, and the terms of the Boundary Waters Treaty of 1909 is a distortion of the law as well as the terms of the instrument itself.

4. The provisions contained in the Boundary Waters Treaty of 1909 do not and cannot deny this Court jurisdiction to entertain Ohio's action. Article III, section 2, clause 2 of the United States Constitution specifically confers upon this Court original jurisdiction in cases in which a State is a party. Thus, Defendant's argument is tantamount to saying that the Boundary Waters Treaty of 1909 supersedes the Constitution and "... it need hardly be said that a treaty cannot change the Constitution. ..." *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 620 (1870).

5. Defendants assert in their briefs that the International Joint Commission, established pursuant to the

⁵ See *Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138 (1934).

Boundary Waters Treaty of 1909, has been vested with adequate power to deal with the mercury poisoning of Lake Erie and thus, this Court "ought to defer" to this "dynamic and invaluable" quasi-judicial apparatus, citing the *Trail Smelter Arbitral Decision*, 35 *Am. J. Int'l L.* 684 (1939), as a "classic example" of the relief available to Ohio. (Brief for Dow Canada, pp. 40-41; Brief for Dow U.S., pp. 12-13). The International Joint Commission is without jurisdiction to consider disputes between Ohio and citizens of other states, *albeit*, one of which is acting through its wholly-owned Canadian subsidiary. Further, pollution problems are not within the adjudicative power of the Commission. Waite, *The International Joint Commission—Its Practice And Its Impact on Land Use*, 13 *BUFF. L. REV.* 93, 97 (1963). The "dynamic and invaluable mechanism" labored in the Trail Smelter matter for nearly three years (while the smelter disgorged 300 to 350 tons of sulphur into the atmosphere daily) before issuing a report which was not accepted. The *Trail Smelter Arbitral Decision*, *supra* at 693. Contrary to what Defendants indicate, the "dynamic" International Joint Commission did not resolve the dispute. It was only after the United States and Canada negotiated a separate convention establishing and empowering a special Tribunal to hear the case, that the matter was finally determined. The decision of the special tribunal was rendered pursuant to the Convention of 1935 with Canada, 49 Stat. 3245 (1935), (not the Boundary Waters Treaty of 1909 as Dow Canada suggests) on March 11, 1941, 12 years and 8 months after having originally been referred to the "dynamic" International Joint Commission.

6. Wyandotte, in turn, argues that by enacting the federal Water Pollution Control Act, Congress pre-empted the field thus invalidating any rights Ohio had respecting the control of its waters outside the provisions of the Act itself. (Brief for Wyandotte, p. 8). In analyzing the pre-emption question, one must start with ". . . the

assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, *supra* at 230. In the instant case, the Act itself conclusively shows that such was not the purpose of Congress:

Nothing in sections 466-466g and 466h-466k of this title shall be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to water (*including boundary waters*) of such states. 33 U.S.C.A. § 466 (c) (emphasis added).

The above language is hardly indicative of a congressional intent to occupy the field of water pollution to the exclusion of state action by its legislature or through the enforcement of its common law rights with respect to the pollution of its waters. *H. P. Welch Co. v. New Hampshire*, 306 U.S. 79, 84 (1939).

7. In addition to Congress' expressed intent not to pre-empt the field, the federal Water Pollution Control Act does not provide for a scheme of federal regulation so pervasive as to preclude State action in this area, *Pennsylvania v. Nelson*, 350 U.S. 497, 502 (1956); *Pennsylvania R.R. Co. v. Public Serv. Comm'n*, 250 U.S. 566, 569 (1919); the field of water pollution is not such that the federal system will be assumed to preclude enforcement of state statutes or common law rights, *Hines v. Davidowitz*, *supra*; nor will the enforcement of Ohio's common law rights produce a result inconsistent with the objective of the federal statute. *Hill v. Florida*, 325 U.S. 538 (1945). See generally, *Rice v. Santa Fe Elevator Corp.*, *supra*.

8. The Secretary of the Interior, Walter Hickel, who is in charge of enforcement of the federal Water Pollution Control Act clearly understands that the states have primary responsibility for abating pollution of public waters

and threatens federal action only in the event a state fails to act. See Appendix VI, wherein Secretary Hickel ordered Ohio to take action immediately to abate this mercury pollution in Lake Erie. Ohio filed actions against all known mercury polluters of Lake Erie. The instant case could not encompass polluters who were citizens of Ohio and for that reason Ohio was required to file the action against DetriX Chemical Industries, Inc. in the Common Pleas Court of Ashtabula County, Ohio on April 22, 1970.

9. For the foregoing reasons, it is submitted that neither the Boundary Waters Treaty of 1909 nor the federal Water Pollution Control Act was intended to occupy the field of water pollution to the exclusion of the states nor are the provisions contained therein operative to that effect. The following observation illustrates the sound policy underlying the passage of the federal Water Pollution Control Act:

Federal law is generally interstitial in nature. It rarely occupies a legal field completely Federal legislation, on the whole, has been conceived and drafted on an *ad hoc* basis to accomplish limited objectives. It builds upon legal relationships established by the states Congress acts, in short, against the background of the total corpus juris of the states in much the way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation.

Hart and Wechsler, *The Federal Courts and the Federal System* (1953), p. 435.

IV. The Supreme Court has Historically Fashioned Appropriate Relief in Water Pollution and Obstruction Cases Even Though no Federal Common Law Exists and There Was no Specific Statutory Authority for Such Relief and in Doing so has Denied Claims That Federal Statutes and Treaties Provide Exclusive Relief.

A. Permanent Injunction Against an Obstruction in Waterways.

1. In *U.S. v. Republic Steel Corp.*, 362 U.S. 482 (1960), this Court approved the issuance of a permanent injunction against industrial deposits into the Calumet River in a suit brought by the Attorney General of the United States under the Rivers and Harbors Act, 33 U.S.C. 409 (1899), which prohibits obstructions in waterways. The Act did not provide for injunctive relief and on that basis the court of appeals held that relief by injunction was not permitted. This Court's decision approved relief by injunction in such circumstances and in language applicable to the instant case:

It is true that § 12 in specifically providing for relief by injunction refers only to the removal of 'structures' erected in violation of the Act (see *United States v. Bigan*, 274 F. 2d 729), while § 10 of the 1890 Act provided for the enjoining of any 'obstruction.' Here again *Sanitary District Co. v. United States*, *supra*, is answer enough. It was argued in that case that relief by injunction was restricted to removal of 'structures.' See 268 U.S., at 408. But the Court replied, 'The Attorney General by virtue of his office may bring this proceeding and no statute is necessary to authorize the suit.' *Id.*, at 426. The authority cited was *United States v. San Jacinto Tin Co.*, 125 U.S. 273, where a suit was brought by the Attorney General to set aside a fraudulent patent to public lands. The Court held that the Attorney General could bring suit, even though Congress had not given specific authority. The test was

whether the United States had an interest to protect or defend. Section 10 of the present Act defined the interest of the United States which the injunction serves. Protection of the water level of the Great Lakes through injunctive relief, *Sanitary District Co. v. United States*, *supra*, is precedent enough for ordering that the navigable capacity of the Calumet River be restored. The void which was left by *Willamette Iron Bridge Co. v. Hatch*, *supra*, need not be filled by detailed codes which provide for every contingency. Congress has legislated and made its purpose clear; it has provided enough federal law in § 10 from which appropriate remedies may be fashioned even though they rest on inferences. Otherwise we impute to Congress a futility inconsistent with the great design of this legislation. This is for us the meaning of *Sanitary District Co. v. United States*, *supra*, on this procedural point. *Id.* at 491-92.

The Attorney General of Ohio files the instant action to protect the interests of Ohio just as the Attorney General of the United States did to protect the interests of the United States. The Attorney General of Ohio also has the benefit of common law which prohibits public nuisance by pollution which was not available to the Attorney General of the United States and in common law actions the remedies are always fashioned by the courts. The courts clearly are not restricted to statutory remedies in a common law action. To suggest otherwise would be an absolute absurdity.

B. Mandatory Injunction to Remove a Vessel From Waterway.

1. In *U.S. v. Cargill*, decided with *Wyandotte Trans. Co. v. U.S.*, 389 U.S. 191 (1967), this Court ordered Cargill to remove a sunken vessel from the Mississippi River even though the Rivers and Harbors Act did not specifically provide for such a remedy. Cargill argued that it was immune from such injunctive relief, the argument

that is now being made by Defendants in the instant case. Defendants Dow U.S. and Dow Canada claim that the remedies provided by the International Joint Commission under the Boundary Waters Treaty of 1909 are exclusive and provides them immunity from injunctive relief in any court or tribunal. Defendant Wyandotte claims that the federal Water Pollution Control Act provides the exclusive remedies for water pollution. This Court has already decided in *Wyandotte, supra*, that, even under similar federal statutes, the remedies specified are not exclusive. See this Court's opinion at page 202, as follows:

Because the interest of the plaintiffs in those cases fell within the class that the statute was intended to protect, and because the harm that had occurred was of the type that the statute was intended to forestall, we held that civil actions were proper. That conclusion was in accordance with a general rule of the law of torts. See Restatement (Second) of Torts § 286. We see no reason to distinguish the Government, and to deprive the United States of the benefit of that rule.

This general rule of the law of torts also applies equally to Ohio which in addition enjoys the full fruits of the common law in prohibiting public nuisances. If the United States should not be deprived of the civil relief of mandatory injunction to get improper objects out of public waters even though the statutes do not provide that relief, clearly Ohio should not be deprived of similar relief with regard to mercury poison in Lake Erie.

C. Damages for Removal.

1. In *Wyandotte Transportation v. U.S., supra*, this Court approved the granting of damages to reimburse the United States for the expenses which it incurred in removing the obstruction which Wyandotte refused to remove from the Mississippi River. Such damages were not provided by the statute and Wyandotte argued it was therefore immune from damages because the Rivers and

Harbors Act provided the exclusive remedies. These damages are quite similar to those sought by the State of Ohio in the instant action—to remove the mercury pollutant from Lake Erie. The Supreme Court finds this relief is available to the United States for the same reasons present in this action. See the Court's opinion at page 204:

It is but a small step from declaratory relief to a civil action for the Government's expenses incurred in removing a negligently sunk vessel. See *United States v. Perma Paving Co.*, 332 F. 2d 754 (C.A. 2d Cir. 1964). Having properly chosen to remove such a vessel, the United States should not lose the right to place responsibility for removal upon those who negligently sank the vessel. See Restatement of Restitution § 115; *United States v. Moran Towing & Transportation Co.*, 374 F. 2d 657, 667 (C.A. 4th Cir. 1967). No issue regarding the propriety of the Government's removal of Wyandotte's barge is now raised. Indeed, the facts surrounding that sinking constitute a classic case in which rapid removal by someone was essential. Wyandotte was unwilling to effectuate removal itself. It would be surprising if Congress intended that, in such a situation, the Government's commendable performance of Wyandotte's duty must be at Government expense. Indeed, in any case in which the Act provides a right of removal in the United States, the exercise of that right should not relieve negligent parties of the responsibility for removal. Otherwise, the Government would be subject to a financial penalty for the correct performance of its duty to prevent impediments in inland waterways. See *United States v. Perma Paving Co.*, *supra*, at 758.

D. Appropriate Relief Is Determined Only After a Full Development of the Facts and in Accordance With Normal Standards of Equity.

1. In any event the nature of the relief which may be available or appropriate in a particular action cannot be

the basis for the Court's decision on a motion to file an original action complaint. Justice Harlan's concurring opinion in *Cargill, supra*, clearly shows the fundamental soundness of this proposition:

I concur in the Court's holding that under § 15 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 409, the United States may recover the costs of removing a vessel negligently sunk in navigable waters from those responsible for the sinking. I further agree with the holding that the United States is entitled to the declaratory relief sought in the *Cargill* action. In affording this latter relief it is my understanding that the Court does not purport to decide whether the United States may also obtain an injunction compelling removal, but has left that question to be answered in light of a full development of the facts, and in accordance with normal standards of equity. *Id.* at 210-11.

In all original actions this Court determines the appropriate relief only in "light of a full development of the facts and in accordance with normal standards of equity." Procedurally this can be accomplished only after the motion to file the complaint is granted.

CONCLUSION

This Court has consistently entertained pollution cases under its original action jurisdiction. All of the essential elements are present in the instant action. Moreover, the pollutant here is a poison, not just garbage, sewage or smoke. Poison in our waters will not and cannot be tolerated but must be removed. The public health, safety and welfare demands protection from such a disastrous situation. Ohio has the duty to see that the poison is removed.

The polluters do not deny their acts but rather admit them. They do not deny the seriousness of this poison in our public waters but rather argue that the situation created by them is so complex and scientifically difficult

that this Court should preclude itself from even receiving evidence on the issues involved. The polluters cannot be allowed to avoid the powers of the judiciary by over dramatizing the difficulty of the solutions to the situation they have created. This Court has an opportunity to receive evidence before deciding whether the polluters can pull themselves up by their own bootstraps with such an argument.

By exercising its traditional judicial powers this Court can pave the way for the entire judiciary to cut through the bramble bush of technicalities and phantom issues which are the arsenal of the polluter. This Court has rendered judgments and orders in much more difficult circumstances than those presented here and the true effectiveness of this Court can be demonstrated to the polluters when its ample powers are exercised ordering them to use their vast resources and scientific genius to solve the calamitous problem they have created. It is conceivable that the polluters are more concerned with the expense and difficulty they will have in performing the tasks ordered by this Court than they are with this Court's problem in enforcing such an order. No one claims it will be inexpensive or simple to remove poison from Lake Erie but why should governments be required to perform this task instead of the polluters.

The polluters here take the usual tack of all polluters. They seek delay, confusion and indecision. They make technical and procedural arguments and feast on the complications of several governmental entities that have an interest to defend and protect when dealing with public waters. They attempt to convert pollution from a base and vile assault on the public's heritage into an international political dispute in the hope that they will be forgotten while the sovereigns debate and delay the day of reckoning. Contrary to the polluters' smokescreen, there is no dispute, there is no conflict, and there is no contest between any governmental entities—all prohibit pollution

and their interests are exactly the same—to protect and defend their citizens' interest in keeping poison out of public waters. Polluters, though they may try, cannot elevate their transgressions into an international conflict.

The polluters clearly realize that they will not win delay, confusion and indecision in this Court. This is the ultimate threat to the polluter. The public is entitled to prompt and final resolution of a matter so grave as poison in public waters. Ohio must act to solve the problem. Under no circumstance can Ohio wait 13 years for an international tribunal to make a recommendation. Ohio cannot wait for all of the appeals and consequent delays which the polluters can cause if Ohio must file this action at the lowest level State Court. Ohio cannot tell its citizens that our constitutional judicial system does not and cannot work to solve so basic a problem as the poisoning of our public waters. The polluters must not be allowed to exclude the people of Ohio from their day in court as contemplated by our Constitution.

PAUL W. BROWN
Attorney General of Ohio
State House Annex
Columbus, Ohio 43215

APPENDIX I

PORTIONS OF ARTICLE ENTITLED "METHYLMERCURY, A REVIEW OF HEALTH HAZARDS AND SIDE EFFECTS ASSOCIATED WITH THE EMISSION OF MERCURY COMPOUNDS INTO NATURAL SYSTEMS," DATED MARCH 20, 1969, by DR. GÖRAN LÖFROTH, RADIOBIOLOGY DIVISION OF THE DEPARTMENT OF BIOCHEMISTRY, UNIVERSITY OF STOCKHOLM, AND WORKING GROUP ON ENVIRONMENTAL TOCIXOLOGY, ECOLOGICAL RESEARCH COMMITTEE OF THE SWEDISH NATURAL SCIENCE RESEARCH COUNCIL, STOCKHOLM, SWEDEN. (Footnotes and page references omitted.)

I Introduction

During the last two decades two cases of mercury poisoning have attracted considerable attention. In Minamata, Japan, 111 persons were killed or severely disabled during 1953-1960. In Sweden the wild birds were the victims. At both instances methylmercury was found to be the poisoning agent.

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In 1965 it was reported that the major part of the mercury in biological samples is in the form of methylmercury, and two years later it was reported that unidentified microorganisms can methylate inorganic mercury.

In 1968 a refined study of the viological methylation process of mercury was published, the results of which must be reason enough to minimize the intentional and unintentional pollution with mercury.

*II Methylmercury poisoning in man**II a The Minamata disease*

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. . . it can be calculated that a dose of methylmercury

of 2 mg Hg/day or less causes the appearance of poisoning symptoms.

. . . .

In the Japanese report on the Niigata tragedy details are given which show that totally 120 persons had one or more of the following symptoms; numbness in the distal parts of the extremities, numbness around the mouth and constriction of the visual field; associated with high mercury concentrations.

. . . .

II b *Pathological and clinical features of severe methylmercury poisoning*

The methylmercury poisoning has been described to cause cerebellar atrophy of the granule cells, preferential injury to the calcerine and also to other cortical regions.

The clinical symptoms start with numbness in the distal parts of the extremities, lips and tongue followed by dysarthria, ataxia of the gait, dysphagia, deafness and blurring of the vision associated with constriction of the visual field. The clinical symptoms develop after a latency period of about 1-2 months after the ingestion or exposure to methylmercury in amounts enough to give rise to the poisoning. The severity of the symptoms depends on the extent of the exposure, and several may be absent in light poisoning cases. A partial recovery may also take place in light poisoning cases.

The latency period, between exposure and development of symptoms, might be associated with a time-dependent redistribution of mercury from the cortex to certain sub-cortical regions, which has been found to take place in monkeys fed Hg labelled methylmercury.

Tejning has studied a number of patents poisoned by ingestion of methylmercury treated seeds and by exposure to methylmercury containing seed dressings. He de-

scribes the symptoms clearly. *E.g.* the speech is not slurred but loud, plosive and unmoderated. The hearing is impaired in the sense that the patient has difficulties to catch, in a conversation between several persons, what one or the other person says.

In addition to the above-mentioned physical handicaps, in different degrees depending on the extent of the poisoning, the patient thus has difficulties to keep contact with his surrounding as it does not understand his inarticulate speech. Mental symptoms do not develop primarily; however, some patients have been classified as hysterics or as having some unidentified mental illness, spending years in mental hospitals, though they were fully aware of their situation. A careful, time-consuming contact with much patience may reveal a full mental capacity.

Whether the poisoning by methylmercury results in death or "only" invalidization depends on the medical care, unless, of course, the exposure to the poison is very high. It should be observed that most deaths in the Minamata area were caused secondarily by infection and inanition.

The neurological disorder is obviously a result of the ability of alkylmercury compounds to penetrate the brain-blood barrier.

Alkylmercury also penetrates the placenta barrier. From the Minamata area 19 congenital cases have been reported. These were born of mothers who had eaten methylmercury contaminated fish and shellfish, and few of the mothers showed symptoms of methylmercury poisoning. Three of these cases have been reported in detail. Only one of the two mothers showed symptoms (minor numbness in the fingers), whereas the other one, giving birth to two cases within 18 months, was apparently healthy.

A similar case has been described by Engleson and Herner. A woman in a family which had eaten food pre-

pared from methylmercury treated seeds gave birth to a girl with congenital cerebralparesis. While two other persons in the family had symptoms of methylmercury poisonings, the mother showed none.

Congenital neurological injuries are thus well documented; effects by methylmercury at an early embryologic stage in man has now also been described.

These results, pertaining to the congenital cases, indicate either that the foetus is more sensitive than the mother or that methylmercury rather accumulates and exerts its effects in the foetus than in the mother (or a combination). See also section VI c, which reviews experiments indicating that mouse foeti are more sensitive than the adult mouse, and Section VIII b, which relates data showing that methylmercury accumulates into the human foetus from the mother-to-be.

II c *Long term effects of brain cell damage*

One observable effect of methylmercury poisoning in man thus is damage to certain brain cells showing up as an impairment of the co-ordination of muscle movements, etc.

The question arises whether these effects are brought about only at and above some threshold value of methylmercury intake. As to the *gross* clinical symptoms one can state that a threshold mechanism is operating. This threshold mechanism is, however, not due to a methylmercury threshold but to a threshold in the number of damaged brain cells. After a damage of one or a few cells, other cells may take over—the net result showing up as *no* effect in the clinical investigation. When too many cells have been damaged during a short time the clinical effects do show up early. This type of mechanism can, erroneously, be classified as a methylmercury threshold mechanism.

As to the effects on single brain cells nothing is known about the methylmercury concentration which can cause irreversible damage. However, even a low frequency of brain cell damage, above the natural inactivation rate of these cells, during a long time has an effect on the organism as the number of available cells for each brain function is limited. Such a damage may then have serious effects in the later stage of life. These considerations must be kept in mind when the toxicological evaluation of alkylmercury compounds are made.

III *Methylmercury containing seed dressing in Sweden*

In the 1940's liquid formulation seed dressings containing methylmercury dicyandiamide were introduced on the Swedish market (mainly Panogen manufactured by Casco Company, Stockholm). Within a short time they dominated the market, successfully competing with all other seed dressings.

Within less than a decade conservationists charged that the intentional spreading of methylmercury caused severe poisonings of seed-eating birds and their predators. *These allegations were dismissed by industry and their agricultural experts.* (emphasis added).

. . . .

In September 1965, a scientific conference was arranged in order to give the governmental authorities advice in the further licensing of alkylmercury compounds. It was shown beyond any doubt that the use of methylmercury in agriculture was responsible for the poisoning and drastic decrease of wild bird populations.

. . . .

IV b *Causes*

Proved and suspected causes of the elevated mercury concentrations in fish are all water- and air-borne mercury pollutions. As methylation of inorganic mercury

occurs in nature, *any pollution of mercury compounds, which can yield inorganic mercury, must be suspected.* (emphasis added).

Major contaminating sources:

- 1) Pulp and paper factories using phenylmercury acetate (PMA) as quantities of PMA are lost through the waste water. . . .
- 2) Chlorine-factories using mercury electrodes. The contamination occurs both by air and water pollution
- 3) Electrical industries using mercury.
- 4) Combustion of fossil fuels

. . . .

IV d *Methylation of inorganic mercury*

Jensen and Jernelöv reported 1967 that unidentified microorganisms can methylate inorganic mercury

Wood *et al.* have shown that the biological methylation of inorganic mercury is a non-enzymatic process involving vitamin B₁₂

. . . .

Methylation of inorganic mercury thus is a normal biological process which can occur in anaerobic ecosystems. Partially or fully anaerobic ecosystems are perpetual appendages to the present industrialized society; polluted waters, sewage water, etc. The formation of the highly toxic and recalcitrant methylmercury, CH₃Hg⁺, follows whenever the formed dimethylmercury is decomposed, *e.g.* by mild acidic environment.

. . . .

X *General conclusions*

There can be no doubt that the intentional pollution with methylmercury, *e.g.* in agriculture, imposes hazards on living systems including man

However, water- and air-borne pollutions of any mercury compound present problems of yet greater magnitudes as mercury can be methylated biologically in several ecosystems. Presently fish in certain fresh and coastal waters has elevated concentrations of methylmercury to such an extent that it is unfit for human consumption.

APPENDIX II

PORTIONS OF STATEMENT OF H. D. DOAN, PRESIDENT, DOW CHEMICAL COMPANY, BEFORE DOW ANNUAL STOCKHOLDERS MEETING AT MIDLAND, MICHIGAN, ON MAY 6, 1970. (pp. 3-5.)

At about the time we announced this policy (environmental sensitivity) earlier this year, we became one of the centers of a seething public controversy—the loss of mercury into the St. Clair River. *Very few things in our history have caused more concern to Dow management and other Dow people than the appearance of mercury residues in fish taken from Lake St. Clair.* (emphasis added).

On the average, about 30 pounds per day of mercury have gone into the effluent of the Sarnia plant of Dow Chemical of Canada. *Today—too late to be sure—but as a point of fact, less than a pound of mercury is going into the river in Sarnia and into the Mississippi at our only mercury cell plant in the United States at the Louisiana Division.* (emphasis added).

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There are about 200 mercury cell caustic-chlorine plants in the world and they consume an average of one-half pound of mercury per ton of chlorine produced. Part of this, more or less depending on the process, goes to the effluent. This has been going on for many years. In fact, some six million pounds of mercury were consumed in the United States in 1968 for all uses; about 1.5 million pounds for chlorine production.

Metallic mercury has long been recognized as a potential hazard to those who work with it. We have, therefore, always had an environmental monitoring program to protect our people from over-exposure. But no one realized until recent research in Sweden brought it to light, that mercury itself or inorganic mercury could be bio-

logically converted to organic methylmercury which is the form predominately found in fish. When I say no one, I mean no one in Dow, no one in industry, no one in the government or the universities.

We are in consultation with those from Sweden and the United States who are now working in this area and have offered our full cooperation to the governments of Ontario and Michigan as well as federal agencies in the United States and Canada.

You may know that only 10 per cent of the chlorine we produce uses the mercury process. For the rest, we use the Dow cell which does not involve mercury. I realize that this is of no consequence to the Lake St. Clair problem. I am sorry, but that is all I can say now until more facts have been assembled. Ben Branch will testify on the mercury problem before Senator Hart's Committee on Commerce this Friday, May 8, just as Julius Johnson testified before the same committee a month ago on 2,4,5-T.

APPENDIX III

PORTIONS OF PRESENTATION BY C.B. BRANCH, EXECUTIVE VICE PRESIDENT, THE DOW CHEMICAL COMPANY, BEFORE THE SUBCOMMITTEE ON ENERGY, NATURAL RESOURCES AND THE ENVIRONMENT OF THE COMMERCE COMMITTEE, U. S. SENATE, SENATOR PHILIP A. HART, SUBCOMMITTEE CHAIRMAN, AT MT. CLEMENS, MICHIGAN, HEARINGS ON MERCURY POLLUTION ON MAY 8, 1970. (pp. 1, 10-11).

Mr. Chairman:

I am Ben Branch, executive vice president of The Dow Chemical Company.

Let me first of all express my concern and the concern of *my company* for the situation in Lake St. Clair and the serious problems it has caused for the fishermen and recreational service industries in this area. (emphasis added). You are to be complimented, Mr. Chairman, not only for calling this hearing but for calling it in the immediate area affected so that the people most directly affected by it can hear some of the facts surrounding this situation and some recommendations that may alleviate it.

I have with me Julius Johnson, research director of The Dow Chemical Company; John Van Westenburg, director of our Electrochemical Laboratory; and William Groening, general counsel, all of Midland, Michigan; and Leonard Weldon, secretary and general solicitor of Dow Chemical of Canada at Sarnia, Ontario.

. . . .

Dow Research Findings

In order better to understand background levels of mercury and profiles in bottom sediments, Dow Chemical of Canada, Limited; The Dow Chemical Company, U.S.;

and a contracting organization, T. W. Beak, Consultants Limited, have performed numerous samplings and analyses. These are supplemental to analyses already reported by public agencies.

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We are widely sampling and analyzing fish and other aquatic organisms, and the Sarnia and Midland analytical laboratories are working 16 hours per day attempting to increase the knowledge in this area.

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At the present time the losses at Sarnia are less than one pound per day, or about two tablespoons of mercury. (emphasis added). The Ontario Water Resources Commission neither accepts nor rejects levels of emissions but it is our understanding that they consider this level to be in compliance with their order dated March 26, 1970. . . .

APPENDIX IV

LETTER FROM DIRECTOR OF DEPARTMENT OF
CONSUMER AND CORPORATE AFFAIRS, CORPO-
RATIONS BRANCH, DOMINION GOVERNMENT, OT-
TAWA, CANADA.

Department of consumer and corporate affairs/
Ministere de la consommation et des corporations

Ottawa, April 24, 1970.

Mrs. Betsy B. Case,
100 E. Broad Street,
Suite 1800,
Columbus, Ohio 43215,
U.S.A.

Dear Madam,

In accordance with our telephone conversation of today, I wish to advise that DOW CHEMICAL OF CANADA, LIMITED was incorporated by federal letters patent dated June 5, 1942 with head office situate at Toronto, Ontario.

By-Law No. 6 was filed with this Department on March 18, 1959, changing the head office of the company from Toronto to Sarnia, Ontario.

The capital stock of the company consists of two hundred and fifty thousand (250,000) preferred shares of the par value of one hundred dollars (\$100.) each and five hundred thousand (500,000) common shares without nominal or par value.

According to the last annual summary filed by the company, namely for the period ended March 31, 1970, the head office is situate at Vidal Street, Sarnia, Ontario. The mailing address is P. O. Box 1012, Sarnia, Ontario. The names and addresses of the directors are as follows:

13 a

Donald K. Ballman, 209 Revere Street, Midland, Michigan 48640.

Richard F. Bechtold, 4405 James Drive, Midland, Michigan 48640.

C. Benjamin Branch, 4607 Eastman Road, Midland, Michigan 48640.

William R. Dixon, 515 Hillcrest Drive, Midland, Michigan 48640.

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L. K. Lichty, 297 London Road, Sarnia, Ontario.

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John L. Smart, 1470 Lakeshore Road, Sarnia, Ontario.

Macauley Whiting, 2203 Eastman Drive, Midland, Michigan 48640.

LeRoy D. Smithers, R.R. #1, Corunna, Ontario.

G. James Williams, 13 Snowfield Court, Midland, Michigan, 48640.

Yours very truly,

(Miss) A. Tremblay
for Director

Corporations Branch
Service des corporations

APPENDIX V

PORTIONS OF ANNUAL REPORT FOR 1969 FOR
THE DOW CHEMICAL COMPANY, CANADA (pp.
25-26)

Sales of Dow Chemical of Canada, Limited, reached a record high. All product divisions reported increased volume, with the best percentage gains recorded by inorganic chemicals, human-health products, and plastic resins, coatings and monomers. Higher costs, price erosion and new-plant start-up costs caused a decline in operating income.

New manufacturing and distribution facilities strengthened Dow's marketing position with the pulp and paper industry, one of Canada's largest. Chlorine and caustic soda were supplied western producers from a new 300-ton-per-day facility at Fort Saskatchewan, Alberta. The Sarnia (Ontario) Works initiated liquid caustic shipments in a chartered tanker via the St. Lawrence Seaway (a "first") to new Dow bulk storage terminals at three points in the pulp- and paper-producing regions of Eastern Canada.

Dow Canada continued to export about 10% of its output, principally to the United States and the United Kingdom but also to The Netherlands, Australia, Hong Kong and Mexico. (emphasis added). Glycols, solvents, styrene, polystyrene and benzoic acid were the major export products.

A \$12 million ethylene-oxide plant at Sarnia was the major capital addition completed in 1969. Using the more efficient direct-oxidation process, it replaces a facility of less capacity based on chlorohydrin which is being economically converted to additional propylene-oxide capacity.

APPENDIX VI

TELEGRAM
JULY 14, 1970

THE HONORABLE JAMES A. RHODES

Information gathered to date by Interior scientists and technicians indicates clearly that the presence of mercury in much of our nation's water constitutes an imminent health hazard. Because of the toxic effects of this metal, which may be irreversible in human beings, immediate action is essential on all levels, public and private.

Preliminary investigations by Interior's Federal Water Quality Administration lead me to conclude that certain firms in your State are discharging mercury into waterways. I am prepared to pursue federal legal action if this proves to be the case and if prompt corrective action is not taken.

Information presently available indicates that many firms in your State are users of mercury. I urge that you determine whether any of these users are discharging mercury. If they are, abatement action should be initiated at once.

I will keep you advised of developments and look forward to working cooperatively with you on this critical matter. Our FWQA regional director stands ready to assist you in this effort.

[Signed] Walter J. Hickel
Secretary of the Interior

INDEX

	Page
Jurisdiction.....	1
Questions presented.....	1
Constitution, statutes and regulations involved.....	2
Interest of the United States.....	2
Statement.....	3
Argument:	
Introduction and summary of argument.....	4
I. This suit is within the original jurisdiction of this Court because Ohio has an Interest as Proprietor and as <i>parens patriae</i> for its citizens.....	7
II. Ohio may apply its law to extra-territorial acts which have effects within its boundaries in the absence of federal law or treaty excluding states from any regulatory role respecting those acts.....	12
III. The state of Ohio is not precluded by any existing treaty or federal statute from bringing an action to abate a public nuisance of the type alleged..	13
A. The Boundary Waters Treaty of 1909 does not vest International Joint Commission with immediate or exclusive jurisdiction over cases or controversies arising out of pollution of the boundary waters.....	13
B. Federal statutes do not preclude state actions for the abatement of polluting practices constituting a public nuisance.....	18
IV. This Court may exercise jurisdiction over a foreign corporation if it has sufficient contacts with the United States to satisfy concepts of due process and is amenable to service of process.....	25
A. The issue whether personal jurisdiction may be exercised over Dow-Canada depends on the existence of sufficient contacts with the United States to meet the requirements of due process.....	26
B. Whether effective service may be had upon Dow-Canada depends upon the resolution of factual issues not appropriate for decision at this time.....	32

II

Conclusion.....	Page 34
Appendix.....	35

CITATIONS

Cases:

<i>American Football League v. National Football League</i> , 27 F.R.D. 264.....	33
<i>Arrow River Tributaries Slide & Boom Co. Ltd.</i> , [1932] 2 D.L.R. 250.....	14
<i>Arrowsmith v. United Press International</i> , 320 F. 2d 219.....	27, 28
<i>Beaty v. M.S. Steel Co.</i> , 401 F. 2d 157.....	27
<i>Bornze v. Nardis Sportswear, Inc.</i> , 165 F. 2d 33.....	27
<i>Bowman v. Curt G. Joa, Inc.</i> , 361 F. 2d 706.....	27
<i>Chicago, M. & St. P. Ry. Co. v. United States</i> , 244 U.S. 351.....	10
<i>Elkart Engineering Co. v. Dornier Werke</i> , 343 F. 2d 861.....	31
<i>Erie R.R. v. Tompkins</i> , 304 U.S. 64.....	28
<i>First Flight Co. v. National Carloading Corp.</i> , 209 F. Supp. 730.....	30
<i>Foster and Elam v. Nielson</i> , 2 Pet. 253.....	17, 28
<i>Fraley v. Chesapeake & O. Ry. Co.</i> , 397 F. 2d 1.....	27
<i>Georgia v. Pennsylvania R. Co.</i> , 324 U.S. 439.....	7, 9, 11
<i>Georgia v. Tennessee Copper Co.</i> , 206 U.S. 230.....	8, 10
<i>Gkiafis v. Steamship Yiosonas</i> , 342 F. 2d 546.....	27, 30
<i>Goldberg v. Mutual Readers League, Inc.</i> , 195 F. Supp. 778.....	27, 30
<i>Guaranty Trust Co. v. York</i> , 326 U.S. 99.....	27
<i>Hess v. Pawlowski</i> , 274 U.S. 352.....	31
<i>Hofman, Alfred & Co. v. Karl Meyer Erste Hessische</i> <i>Wirkmaschinenfabrik GMBH</i> , 159 F. Supp. 77.....	31
<i>International Shoe Co. v. Washington</i> , 326 U.S. 310.....	25, 26, 30, 31
<i>Kenny v. Alaska Airlines</i> , 132 F. Supp. 838.....	28
<i>Lone Star Package Car Co. v. Baltimore & O. R. Co.</i> , 212 F. 2d 147.....	27
<i>Massachusetts v. Mellon</i> , 262 U.S. 447.....	27
<i>McGee v. International Life Ins. Co.</i> , 355 U.S. 220.....	31
<i>Missouri v. Illinois</i> , 200 U.S. 496.....	8, 23
<i>Moriarty, Edward J. and Co. v. General Tire & Rubber</i> <i>Co.</i> , 289 F. Supp. 381.....	29

III

Cases—Continued

	Page
<i>National Gas Appliance Corp. v. AB Electrolus</i> , 270 F. 2d 472.....	31
<i>Nelson v. Miller</i> , 11 Ill. 2d 378.....	31
<i>New Hampshire v. Louisiana v. New York v. Louisiana</i> , 108 U.S. 76.....	8, 27
<i>New Jersey v. New York</i> , 283 U.S. 473.....	8, 12, 17, 18, 23
<i>New York v. New Jersey</i> , 256 U.S. 296.....	19, 23, 24
<i>North Dakota v. Minnesota</i> , 263 U.S. 365.....	8, 10, 11
<i>Oklahoma v. Atchison, T. & S. F. Ry.</i> , 220 U.S. 277.....	7, 8, 10
<i>Oklahoma v. Cook</i> , 304 U.S. 387.....	7, 8, 10
<i>Pacific Lanes, Inc. v. Bowling Proprietors Ass'n of America</i> , 248 F. Supp. 347.....	33
<i>Pennsylvania v. Wheeling Bridge Co.</i> , 54 U.S. 518.....	9
<i>Pulson v. American Rolling Mill</i> , 170 F. 2d 193.....	24
<i>Rayco Manufacturing Co. v. Chicopee Manufacturing Co.</i> , 148 F. Supp. 588.....	30
<i>Rice v. Santa Fe Elevator Corp.</i> , 330 U.S. 218.....	13
<i>Riverbank Labs. v. Hardwood Prods. Corp.</i> , 350 U.S. 1003.....	28
<i>Roberts v. Evans Case Co.</i> , 218 F. 2d 893.....	27
<i>Rocco v. Thompson</i> , 223 U.S. 317.....	18
<i>Sei Fujii v. State</i> , 38 Cal. 2d 718.....	18
<i>Scilon, Inc. v. Breme, S.A.</i> , 271 F. Supp. 516.....	31
<i>South Dakota v. North Carolina</i> , 192 U.S. 286.....	12
<i>St. Clair v. Righter</i> , 250 F. Supp. 148.....	27
<i>United States v. Aluminum Company of America</i> , 148 F. 2d 416.....	12
<i>United States v. Interlake Steel Corp.</i> , 297 F. Supp. 912.....	23
<i>United States v. Pink</i> , 315 U.S. 203.....	18
<i>United States v. Scophony Corp. of America</i> , 333 U.S. 795.....	31
<i>Utah v. United States</i> , 394 U.S. 89.....	32
<i>Wisconsin v. Duluth</i> , 96 U.S. 379.....	19

Constitution, Treaty, and statutes:

Constitution of the United States:

Article III, Section 2.....	1, 7, 35
Article VI.....	13
Boundary Waters Treaty of 1909 between the United States and Great Britain, 36 Stat. 2448.....	5
28 U.S.C. 1251.....	1, 35
33 U.S.C. 407.....	20
33 U.S.C. 441.....	19, 20
33 U.S.C. 1001.....	20

Federal Water Pollution Control Act, 33 U.S.C. 1151

et seq.:

	Page
33 U.S.C. 1151.....	5, 17, 19, 36
33 U.S.C. 1151(b).....	20, 36
33 U.S.C. 1151(c).....	18, 36
33 U.S.C. 1160.....	20, 36
33 U.S.C. 1160(b).....	21
33 U.S.C. 1160(h).....	23
33 U.S.C. 1161.....	22
33 U.S.C. 1161(f).....	23
33 U.S.C. 1162.....	22, 45
33 U.S.C. 1162(e).....	22, 45
33 U.S.C. 1163(e).....	23
33 U.S.C. 1163(f).....	22
33 U.S.C. 1175.....	19

Miscellaneous:

33 Am. J. Intl. Law 182.....	16
33 Am. J. Intl. Law 684.....	16
Annot., <i>Federal or Statute Law as Controlling, in Diversity Action, Whether Foreign Corporation is Amenable to Service of Process in State</i> , 6 A.L.R. 3d 1103.....	27
Barry, <i>The Evolution of the Enforcement Provisions of the Federal Water Pollution Control Act</i> , 68 Mich. L. Rev. 1103.....	21, 23, 24
<i>Federal or State Law as Controlling, In Diversity Action, Whether Foreign Corporation is Amenable to Service of Process in State</i> , 6 A.L.R. 3d 1103.....	27
Foster, <i>Judicial Economy, Fairness and Convenience of Place of Trial: Long-Arm Jurisdiction in District Courts</i> , 47 F.R.D. 73.....	27, 28
Green, <i>Federal Jurisdiction in Personam of Corporations and Due Process</i> , 14 Vand. L. Rev. 967.....	27, 28
Hines, <i>Nor Any Drop to Drink: Public Regulation of Water Quality</i> , 52 Iowa L. Rev. 186.....	21, 23, 24
Moody, <i>Industrial Manual</i> , p. 1572.....	33
2 Moore, <i>Federal Practice</i> :	
4.22.....	33
4.25, 4.41.....	32
Note, <i>Doing Business as a Test of Venue and Jurisdiction over Foreign Corporations in the Federal Courts</i> , 56 Colum. L. Rev. 394.....	27

Miscellaneous—Continued

	Page
Note, <i>Jurisdiction—Long-Arm Statutes—Corporate Affiliation as a Basis for Assuming Jurisdiction</i> , 14 Wayne L. Rev. 1228.....	32
Note, <i>Jurisdiction of Federal Courts Over Foreign Corporations</i> , 69 Harv. L. Rev. 508.....	26
<i>Private Remedies for Water Pollution</i> , 70 Colum. L. Rev. 734.....	12
Reorganization Plan No. 3 of 1970, effective December 2, 1970, 35 Fed. Reg. 15,623.....	37
Restatement of the Foreign Relations Law of the United States 2d, § 20.....	12
Rule 4, Federal Rules of Civil Procedure.....	33, 46
Rule 9(2), Rules of the Supreme Court.....	46
Waite, <i>The International Joint Commission—Its Practice and Its Impact on Land Use</i> , 13 Buffalo L. Rev. 93.....	16
4 Wright & Miller, <i>Federal Practice and Procedure</i> :	
§1066–1069.....	31
§1075.....	27
§1101–1102.....	33

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 41 Original

STATE OF OHIO, EX REL. PAUL W. BROWN, ATTORNEY
GENERAL OF OHIO, PLAINTIFF

v.

WYANDOTTE CHEMICALS CORPORATION, ET AL.

ON MOTION FOR LEAVE TO FILE COMPLAINT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

JURISDICTION

Ohio's motion for leave to file a complaint against three corporations, incorporated respectively in Michigan, Ontario, and Delaware, invokes the original jurisdiction of this Court under Article III, Section 2 of the Constitution and 28 U.S.C. 1251, which confer original jurisdiction over controversies between a State and citizens of another State and between a State and citizens of foreign countries.

QUESTIONS PRESENTED

1. Whether Ohio, individually or as *parens patriae*, is the real party in interest as to the matters complained of and the type of relief sought.

(1)

2. Whether in the absence of federal statute or treaty, Ohio would have a common law action to abate pollution of boundary waters.

3. If so, whether that action is precluded either by treaty or federal statute.

4. Whether this Court must deny leave to file a complaint as to one of the defendants, a Canadian corporation which asserts, fundamentally on factual grounds, that this Court has no jurisdiction with respect to it.

5. Assuming there is no legal bar to filing of an original complaint in this Court, whether leave to file should be denied by this Court in its discretion.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The pertinent Constitutional and statutory provisions and Rules are set forth in Appendix A, *infra*, pp. 35-47.

INTEREST OF THE UNITED STATES

On October 12, 1970, this Court invited the United States to file a brief expressing its views and to participate in oral argument, as *amicus curiae*, on the question whether Ohio should be granted leave to file this complaint.

This case involves a serious claim of pollution of Lake Erie and its tributaries by mercury and mercury compounds released by corporations operating plants in Michigan and Canada. Such environmental problems are of increasing concern to the federal government, and it is attempting to assist in achieving a solution to them. It has not, however, sought to

displace state and local authority. An important issue here is the allocation of responsibility between federal and state governments in solving environmental problems which transcend state or national boundaries. Specifically, this case raises the question of the proper relationship among independent state activity, federal legislation, and a treaty, all designed to help in curbing pollution.

STATEMENT

The State of Ohio, on its own behalf and for its citizens, seeks leave to file a complaint to initiate an original action against Wyandotte Chemicals Corporation, a Michigan corporation, Dow Chemical of Canada, a Canadian corporation (hereinafter "Dow-Canada"), and Dow Chemical Company, a Delaware corporation (hereinafter "Dow-United States"). The complaint alleges that the defendant companies have discharged "poisonous mercury or compounds thereof into Lake Erie or tributaries thereto" in a negligent manner (Complaint, p. 7) and that their actions have created "a public nuisance which must be abated in order to protect Lake Erie and the health and safety of the citizens and inhabitants of Ohio" (Complaint, p. 8).¹

Ohio alleges that it is the owner of Lake Erie from the Ohio shore to the international boundary be-

¹ The complaint also appears to base Ohio's action on violations of federal statutes and a federal treaty, none of which would support actions by a state as *parens patriae* for its citizens. *Massachusetts v. Mellon*, 262 U.S. 447; *infra* p. 9, n. 3. Ohio's brief in support of its Motion, however, discusses only the public nuisance theory, and we treat the complaint in that light.

tween the United States and Canada,² and that it also owns all the fish within these bounds "to the extent fish in their wild state can be owned" (Complaint, p. 5). It contends that to the extent it does not own Lake Erie in the ordinary proprietary sense, it holds title "under the public trust doctrine" and is therefore responsible, as *parens patriae*, to protect the interest of its citizens in "navigation, commerce and fishing" on Lake Erie, as well as their health and safety (Brief, p. 8). Ohio prays for an injunction against further introduction of "poisonous mercury or compounds thereof into Lake Erie or tributaries thereto" (Complaint, p. 9). Ohio further seeks an order requiring defendants to remove mercury which already has been introduced into Lake Erie or its tributaries, because of the continuing deleterious effects if it remains. Alternatively, Ohio seeks damages in a sum sufficient to permit it to remove the mercury, "said sum to be held in trust for and expended only for this purpose by Plaintiff" (*ibid.*). Finally, the state seeks compensation "for the existing and future damages to Lake Erie, the fish and other wildlife, the vegetation and the citizens and inhabitants of Ohio" (*ibid.*).

ARGUMENT

INTRODUCTION AND SUMMARY OF ARGUMENT

Defendants have raised a number of objections in opposition to the motion for leave to file the Com-

² The complaint appears to make no claim of ownership in a proprietary capacity, but Ohio's brief in support of its motion establishes, pp. 4-6, that such a claim is made, and we treat the complaint in that light.

plaint. These generally may be categorized as legal arguments that this Court is without jurisdiction of this suit and prudential arguments that this Court should not, in its discretion, entertain this suit. The primary legal arguments of defendants are: that the State of Ohio is not the real party in interest, at least with respect to claims for damages on behalf of its citizens; that the Boundary Waters Treaty of 1909 between the United States and Great Britain, 36 Stat. 2448 (Dow-Canada, App. 2a-15a), and the Federal Water Pollution Control Act, as amended, 84 Stat. 91, 33 U.S.C. 1151-1175 (App. A, *infra*, pp. 36-46), preclude court action by states with respect to pollution of interstate or international waters; and that there is no basis for exercise by courts of the United States of jurisdiction over Dow-Canada. Among defendants' prudential arguments are the assertions that the prayer for injunctive relief is essentially moot because the companies have already stopped discharging mercury compounds into Lake Erie; that this Court could not fashion and enforce an effective decree with respect to the other relief sought in view of the difficulty of removing mercury which already has been discharged and the uncertain cost and effects of removal; and that the general problems of pollution of Lake Erie and its tributaries would, as a practical matter, be better solved by cooperative efforts of the countries, states and provinces involved, under federal statutes and the treaty, than by litigation.

In this brief, we address ourselves only to the legal issues regarding the filing of the Complaint. We express no opinion on the prudential matters raised or

on certain factual assertions made in connection with legal arguments regarding jurisdiction over and service of process upon the Canadian corporation. We conclude that there is no legal reason why this Court should not permit the Complaint to be filed if, in its discretion, it decides to do so.

At least with regard to its claim for an injunction against further discharge of mercury into Lake Erie and to require mercury already discharged to be removed (or alternatively for damages sufficient to permit it to conduct the removal), Ohio is a real party in interest to this suit. It does not seek relief for particular citizens or groups of citizens but as *parens patriae*.

Unless it is precluded by treaty or federal law, Ohio may validly apply its common law to actors outside its territory who create a public nuisance within its boundaries. Neither the Boundary Waters Treaty of 1909 nor existing federal legislation preclude Ohio from independent action to deal with water pollution in its territory. The Treaty provides a means for settling disputes between the United States and Canada regarding pollution of international waters, but it is not self-executing. The Federal Water Pollution Control Act also provides a mechanism for dealing with pollution of interstate and international waters. But that act, like other, less comprehensive, federal legislation dealing with environmental problems, explicitly indicates the government's intention to leave primary responsibility in this area to the states. Whether or not resort to the procedures established by the Federal Water Pollution Control Act would be the most desir-

able means for dealing with a situation such as this, the Act manifestly does not preclude pursuit by a state of alternative remedies.

There is, finally, no legal reason for this Court to deny leave to file the complaint on grounds of possible problems concerning personal jurisdiction over Dow-Canada. These issues are predominantly factual ones, whether Dow-Canada has sufficient contacts with the United States to permit assertion of jurisdiction over it as a matter of due process and whether service on Dow-Canada can be obtained. As such, these issues can be resolved on a proper motion after the complaint has been filed.

I. THIS SUIT IS WITHIN THE ORIGINAL JURISDICTION OF THIS COURT BECAUSE OHIO HAS AN INTEREST AS PROPRIETOR AND AS *PARENS PATRIAE* FOR ITS CITIZENS

Under Article III, Section 2, this Court has original jurisdiction in cases in which "a State shall be Party." However, in order to prevent excessive or improper use of this provision, the Court has consistently declined jurisdiction of original cases where the State merely "elects to make itself * * * a party plaintiff." *Oklahoma v. Atchison, T. & S.F. Ry.*, 220 U.S. 277, 289. It has insisted that "the State must show a direct interest of its own and not merely seek recovery for the benefit of individuals who are the real parties in interest." *Oklahoma v. Cook*, 304 U.S. 387, 396.

The Court has thus permitted states to bring suits against other states and private parties to protect its own sovereign interests or to vindicate the interests of its citizens as a whole, as *parens patriae*. E.g., *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439; *New*

Jersey v. New York, 283 U.S. 473; *Georgia v. Tennessee Copper Co.*, 206 U.S. 230. But the Court has refused to permit original suits to be filed where the relief is sought primarily on behalf of particular citizens or particular classes of citizens. *Oklahoma v. Cook*, *supra*; *Oklahoma v. Atchison, T. & S.F. Ry.*, *supra*; *North Dakota v. Minnesota*, 263 U.S. 365; *New Hampshire v. Louisiana*, *New York v. Louisiana*, 108 U.S. 76.

Ohio seeks three different forms of relief: an injunction against further discharge of mercury; an order requiring defendants to remove mercury which already has been introduced into the lake, or, alternatively, a monetary award sufficient to permit it to remove the substances; and compensatory damages for the harm to the lake.

1. There is no dispute that Ohio's claim for injunctive relief is properly within the original jurisdiction which this Court has traditionally exercised. In *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, the Court entertained a suit to abate a public nuisance by Georgia against a Tennessee company which was discharging noxious gas across the border into Georgia, and ultimately issued an injunction. Similarly, this Court has permitted suits by a state seeking injunctions against a gamut of practices, from dumping of sewage in an interstate stream to the detriment of the health and comfort of inhabitants (*Missouri v. Illinois*, 200 U.S. 496; see, *New Jersey v. New York City*, 283 U.S. 473), to discriminatory freight rates, set in violation of the antitrust laws, which damaged the state's economy generally and specifically affected its

interest as proprietor of a railroad and various other institutions in the State (*Georgia v. Pennsylvania R. Co.*, 324 U.S. 439).³

2. Orders requiring affirmative action to eliminate the effects of a practice which persist after the practice itself has been discontinued have not often been sought or granted in original suits. Frequently, enjoining the continuation of an illegal practice is all, or nearly all, that is necessary to prevent harmful effects for the future. The nuisance abates when noxious odors are no longer discharged. Or, the relative rapidity with which sewage is decomposed or diffused to the point of harmlessness renders the need for removal slight.

Where abatement of the nuisance has necessitated affirmative acts, however, this Court has given no indication it will refuse to consider requiring them. In *Pennsylvania v. Wheeling Bridge Co.*, 13 Howard 518, the Court ordered alteration, or removal, of a bridge which was found to obstruct navigation on the Ohio River. Similarly, here, there is no legal principle which would preclude this Court from exercising traditionally flexible equitable powers to insure a complete remedy where it is claimed that more than mere discontinuation of a practice is essential. Such relief is evidently for the benefit of the State and its citizens as a whole and not for particular individuals.

³ Because Ohio has an independent interest, at least in injunctive relief, and since there is no conflict with federal policy regarding pollution abatement of Lake Erie (see *infra*, pp. 13-24), the state's interest as *parens patriae* is not superseded by that of the federal government. Cf. *Massachusetts v. Mellon*, 262 U.S. 447.

The same reasoning establishes the propriety of Ohio's prayer, in the alternative, for a monetary award keyed specifically to the cost of removal and to be held in a specific account for that purpose. That alternative, in fact, is one which ordinarily is available to a court of equity if it is felt that payment to the party complaining of a nuisance to permit him to eliminate or ameliorate its effects would be preferable to affirmative acts by the tortfeasor. See *Chicago, M. & St. P. Ry. Co. v. United States*, 244 U.S. 351; cf. *Georgia v. Tennessee Copper Co.*, *supra*.

The argument generally made against monetary damages in original actions is that, as to them, the state is not the real party in interest. *E.g.*, *Oklahoma v. Cook*, *supra*; *Oklahoma v. Atchison, T. & S.F. Ry.*, *supra*. In *North Dakota v. Minnesota*, *supra*, there were claims for both injunctive relief and damages. North Dakota sued to enjoin Minnesota's draining water from land into an interstate river which caused that river to flood land in North Dakota. It also claimed monetary damages of \$5,000 for itself and \$1 million on behalf of farmers whose land was damaged. This Court assumed jurisdiction of the claim for equitable relief. It refused, however, to take jurisdiction over the damage claims. It pointed out that farmers whose land had been damaged had contributed to a fund to defray the cost of maintaining the suit and that it was agreed they would share any recovery in the proportion of the damage they had suffered. The Court concluded that the State would not

have asserted the claim for damages except at the behest of and directly on behalf of the farmers.

Where, as here, damages are sought for a specific fund, to be used for what is preeminently a state or public purpose, this line of reasoning lacks force. True, even if restricted to use in removing mercury from the lake or stabilizing it in the lake bottom, the award might benefit some Ohioans more than others. But the same would be true of the injunctive relief which this Court has unquestioned authority to grant. Those who would make greater use of the lake have more to gain from whatever is done to improve it or to prevent its further injury. The governing factor in this Court's cases has been the directness of relief to individuals, warranting the conclusion that it is sought essentially for them. No such conclusion is warranted here. There is nothing to suggest that the differential impact of monetary payments to a special fund, any more than injunctive relief, negates the overriding interest which Ohio has in the well-being of its citizens. See *Georgia v. Pennsylvania R. Co.*, *supra*.

3. There remains the third form of relief Ohio seeks: compensatory damage for harm already done to its interests in the lake and to those of its citizens. It is not possible to say with certainty here, as the Court concluded in *North Dakota v. Minnesota*, *supra*, that it is inconceivable that the state would have asserted the claim but for the individual interests of lakeside land owners, fishermen, and the like. Indeed, it is uncertain how Ohio proposes to disburse any funds it might receive under this claim; nor has any monetary

value been put on the damage done to its proprietary interests as distinct from those of its citizens. Quite possibly the claim is made as a means of measuring the funds which ought to be paid into the trust fund for reclamation—a sum which otherwise could be quite difficult to calculate. See Note, *Private Remedies for Water Pollution*, 70 Colum. L. Rev. 734, 746-747 (1970). It is clear that the state may sue for damages done to its own interests as proprietor. *South Dakota v. North Carolina*, 192 U.S. 286. As to the remainder, it would be appropriate to require Ohio to clarify the purpose for which it seeks this relief; but as matters presently stand, there is insufficient basis to conclude that the *parens patriae* claim for compensatory damages falls outside this Court's original jurisdiction.

II. OHIO MAY APPLY ITS LAW TO EXTRA-TERRITORIAL ACTS WHICH HAVE EFFECTS WITHIN ITS BOUNDARIES IN THE ABSENCE OF FEDERAL LAW OR TREATY EXCLUDING STATES FROM ANY REGULATORY ROLE RESPECTING THOSE ACTS

The mercury which Ohio contends has created a common law nuisance within its territory was discharged into Lake Erie or its tributaries in Michigan and Canada. However, these acts may have caused effects within Ohio's boundaries. It is well-established, under American and international law, that a "state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders which the state reprehends; and these liabilities other states will ordinarily recognize." *United States v. Aluminum Co. of America*, 148 F. 2d 416, 443 (C.A. 2); Restatement of

the Foreign Relations Law of the United States 2d, § 18; *New Jersey v. New York*, *supra*.⁴ Thus, so long as the federal government has not prescribed, by treaty or statute, a system of regulation of water pollution which precludes state action in this field, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, Ohio may apply its common law against those whose acts created nuisance within the state.

III. THE STATE OF OHIO IS NOT PRECLUDED BY ANY EXISTING TREATY OR FEDERAL STATUTE FROM BRINGING AN ACTION TO ABATE A PUBLIC NUISANCE OF THE TYPE ALLEGED

A. THE BOUNDARY WATERS TREATY OF 1909 DOES NOT VEST THE INTERNATIONAL JOINT COMMISSION WITH IMMEDIATE OR EXCLUSIVE JURISDICTION OVER CASES OR CONTROVERSIES ARISING OUT OF POLLUTION OF THE BOUNDARY WATERS

The Boundary Waters Treaty of 1909 is the supreme law of the United States, Const. Art. VI, and has been implemented in Canada by Act of Parlia-

⁴ Although a state has jurisdiction to prescribe a law which applies to acts committed outside its territory, enforcement of a remedy outside its territory will require action by the courts of the foreign jurisdiction. Cf. Restatement of the Foreign Relations Law § 20. In this case, it therefore might be necessary for Ohio to seek enforcement of a decree in Canadian courts, particularly if it is concluded that enforcement against Dow-United States is inappropriate or inadequate. In such an event, Ohio would stand before the Canadian courts as any other suitor seeking to enforce a decree of a foreign court. While uncertainty with regard to the enforcement of a decree may be a factor in determining the nature of the decree, it does not, in our view, prevent this Court from exercising jurisdiction over this case.

ment.³ Article 4 of the Treaty provides that the "boundary waters * * * shall not be polluted on either side to the injury of health or property on the other." (36 Stat. 2450) But this general prohibition cannot be said to provide the exclusive legal remedy for problems of pollution in the boundary waters, for it is not self-executing. No provision of the treaty grants a direct remedy for its violation, and its enforcement depends upon further action by one or both of the signatories.

Any remedy would flow through the International Joint Commission established by Article 7 of the Treaty. The Commission's powers are defined in Articles 8-10. None of these in itself authorizes it to reach binding determinations in pollution cases.

Articles 8 empowers the Commission to "pass upon all cases involving the use or obstruction or diversion of the waters with respect to which under Articles 3 and 4 * * * the approval of this Commission is required" (36 Stat. 2451). Those Articles specifically describe the types of projects for which approval is required. For example, Article 4 states that the "Parties * * * will not permit the construc-

³ A treaty in Canada is "enforceable by the Courts only where the treaty has been implemented or sanctioned by legislation rendering it binding upon the subject * * *." *Re Arrow River & Tributaries Slide & Boom Co. Ltd.*, [1932] 2 D.L.R. 250, 260 (Supreme Court of Canada). The Boundary Waters Treaty has been expressly confirmed by Canadian Act of Parliament, Statutes of Canada, 1-2 George V, ch. 28, May 19, 1911 (An Act relating to the establishment and expenses of the International Joint Commission under the Waterways Treaty of January the eleventh, nineteen hundred and nine).

tion or maintenance * * * of any remedial or protective works or any dams or other obstructions * * * the effect of which is to raise the natural level of waters on the other side of the boundary, unless * * * approved by the * * * Commission" (36 Stat. 2450). Significantly, the proscription of pollution, which immediately follows this provision in Article 4, does not mention approval or action by the International Joint Commission.

Articles 9 and 10 provide for reference to the Commission of "other questions or matters of difference" between the parties. Under Article 9, a matter may be referred by either government for study and recommendations, "subject * * * to any restrictions or exceptions which may be imposed with respect thereto by the terms of the reference" (36 Stat. 2452). Reports under the Article "shall not be regarded as decisions * * * either on the facts or the law, and shall in no way have the character of an arbitral award" (*ibid*). It follows that no binding determination of a pollution problem could be had under Article 9; reliance upon its procedures could produce no assurance of remedy.⁶

⁶The only dispute between the United States and Canada with regard to pollution ever referred to the International Joint Commission was the case of the Trail Smelter, relied upon by defendants as an example of practice under the Treaty (*E.g.*, Dow-Canada Brief, p. 41). Fumes from a smelter at Trail, British Columbia, were alleged to have damaged property in the state of Washington. The matter was referred by both Governments under Article 9 to the International Joint Commission in 1928, with the reference specifically noting that no binding decision was sought. The Commission rendered a report in 1931, recommending a monetary settlement for claims up to

Article 10 does vest the Commission with power to render binding decisions on matters referred by consent of both Parties, subject again to "any restrictions or exceptions * * * imposed * * * by * * * the reference" (36 Stat. 2453). But the Article states that any joint reference "on the part of the United States * * * will be by and with the advice and consent of the Senate, and on the part of His Majesty's Government with the consent of the Governor-General in Council" (*ibid.*). Perhaps because of these requirements, there has never been a reference for binding arbitration under Article 10.

Article 8, then, is the only self-executing provision for enforcement of treaty rights. Since pollution is clearly not within its scope, see Bloomfield & Fitzgerald, *Boundary Water Problems of Canada and the United States*, 20, consideration of problems and enforcement of rights under the Treaty requires specific, additional executive or legislative action by the Gov-

1931. The proposal was in fact accepted, but there was never any certainty that it would be. A separate commission was subsequently established by a special convention to arbitrate claims for post-1931 damages. See Bloomfield & Fitzgerald, *Boundary Waters Problems of Canada and the United States*, 39, 137-138; The Trail Smelter Arbitral Decisions, 33 Am. J. Intl. Law 182 (1939), 35 Am. J. Intl. Law 684 (1941).

Under Article 9, the parties have several times requested the Commission to investigate and report generally on problems of water pollution. A technical board of advisors which reports semi-annually has also been established; its recommendations, too, are merely precatory. See generally, Bloomfield & Fitzgerald, *supra*; Waite, *The International Joint Commission—Its Practice and Its Impact on Land Use*, 13 Buffalo L. Rev. 93 (1963).

ernments; the acts necessary to produce a binding adjudication amount to the execution of a separate treaty. There is, moreover, no indication of an intent, much less a practice, of the parties to make the referral mechanism the sole means for handling pollution problems. To the contrary, the governments continue to take independent action in this field. The Federal Water Pollution Control Act, as amended (33 U.S.C. 1151-1175), upon which defendants also rely, is an example. That Act, which applies to the Great Lakes along with other "interstate waters," provides machinery for dealing with water pollution problems which is much more elaborate and certain than that provided by the Treaty. In these circumstances, this Court need not defer to the Treaty. See *Foster and Elam v. Neilson*, 2 Pet. 253.

2. The Treaty discusses only the rights of the United States and Canada and permits only them to refer matters to the International Joint Commission.²

² The only reference to individual rights is in Article 2. That Article specifies that individuals who suffer injury as a result of interference with or diversion of waters flowing across the boundary shall have "the same rights and * * * legal remedies as if such injury took place in the country where such diversion or interference occurs * * *". 36 Stat. 2449. This provision assures that, as to the subject treated, litigants will not experience the enforcement problems which might otherwise arise out of the necessity of proceeding, at some point, in a foreign tribunal. See n. 4, *supra*. Such assurance of enforcement is not given as to other problems, such as the pollution problem here. But the United States does not believe that Article 2, by implication, negates the settled principle of liability for the international consequences of one's acts as to such problems. Cf. *New Jersey v. New York City*, 283 U.S. 473, 482-483.

It does not, however, evince a purpose on the part of the national governments to exclude their states and provinces from an independent role in responding to problems of boundary water pollution. As a general rule "treaties * * * [are] carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effect the national policy" *United States v. Pink*, 315 U.S. 317. See, also, *Rocca v. Thompson*, 223 U.S. 317. Where a treaty is not self-executing, even local laws which are inconsistent with its terms are not superseded until there is implementing legislation. *Sei Fujii v. State*, 38 Cal. 2d 718, 242 P. 2d 617 (Sup. Ct. Cal.). Action on the part of a State in pollution matters conflicts neither with the terms of the treaty nor with the policy of the United States. Indeed, the nation's policy, as expressed in the Federal Water Pollution Control Act, appears to be exactly the opposite. Section 1(c) of that Act states:

Nothing in this Act shall be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (*including boundary waters*) of such States. [33 U.S.C. § 1151(c); Emphasis added.]

B. FEDERAL STATUTES DO NOT PRECLUDE STATE ACTIONS FOR THE ABATEMENT OF POLLUTING PRACTICES CONSTITUTING A PUBLIC NUISANCE

While federal action affirmatively encouraging the defendants' conduct might foreclose Ohio's cause of

action,⁸ the defendants claim no such federal license here. Rather, assuming that the condition their plants produce is one which might require a remedy, they insist that federal statutes—notably, the Federal Water Pollution Control Act, as amended, 33 U.S.C. 1151–1175⁹—provide the exclusive remedy. The Water Pollution Control Act is by far the most comprehensive

⁸ In *Wisconsin v. Duluth*, 96 U.S. 379, this Court dismissed an original action brought by Wisconsin against the city of Duluth, Minnesota, for diversion of waters upon finding that the federal government had taken possession and control of the diversion project. On the other hand, in New Jersey's suit against New York City regarding the effect of the city's practice of dumping garbage seaward of the state's beaches, it was held to be no defense that the city dumped the garbage at places designated by the harbor supervisor acting under a federal statute specifically designed to regulate such activities. 33 U.S.C. 441 *et seq.*; *New Jersey v. New York City*, 283 U.S. 473. "There is nothing in the Act that purports to give one dumping at places permitted by the supervisor immunity from liability for damage or injury thereby caused to others or to deprive one suffering injury by reason of such dumping of relief that he otherwise would be entitled to have. There is no reason why it should be given that effect." *Id.* at 482–483. Nor did the existence of a "contract" between the federal government and a New Jersey sewage district regarding the manner in which sewage would be treated before discharge into New York Bay foreclose, of its own weight, a suit by New York State to enjoin the discharge; the Court carefully examined the evidence and the remedies given under the contract before concluding, on the merits, that the state had not established that a public nuisance would be created. *New York v. New Jersey*, 256 U.S. 296, 312–313.

⁹ The Act is set out in the 1964 edition at Sections 466–466k, and was amended and renumbered by an Act of April 3, 1970, P.L. 91–224, 84 Stat. 91. Recent amendments were also made in 1965 (79 Stat. 903) and 1966 (80 Stat. 1246). And see n. 25, *infra*, p. 37.

federal statute dealing with pollution of the interstate or navigable waters of the United States.¹⁰ But like other enactments in the area of environmental control,¹¹ the act makes clear that the role of federal law is to supplement rather than to supplant state action. Section 1(b) of the Act declares that "the policy of Congress [is] to recognize, preserve, and protect the primary responsibilities and rights of the States in preventing and controlling water pollution * * *." 33 U.S.C. 1151(b).

This motif is carried forward in Section 10 of the Act, 33 U.S.C. 1160, which provides for the development and enforcement of water quality standards for interstate and navigable waters and their tributaries. The section specifically states that except where the Attorney General has actually obtained a court order

¹⁰ In addition to statutes regarding pollution of particular waterways, *e.g.*, 33 U.S.C. 441 *et seq.*, n. 8, *supra*, the federal statutes of general application to water pollution are Section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. 407, commonly known as the Refuse Act, which prohibits the discharge or dumping of any refuse matter into navigable waterways; and the Oil Pollution Act of 1961, 33 U.S.C. 1001 *et seq.*, dealing with oil pollution at sea. Quite properly, it is not suggested that either of these Acts preempts Ohio here.

¹¹ *E.g.*, Section 202(b) of the Environmental Quality Improvement Act of 1970, 84 Stat. 114:

"(1) The Congress declares that there is a national policy for the environment which provides for the enhancement of environmental quality. This policy is evidenced by statutes heretofore enacted relating to the prevention, abatement, and control of environmental pollution, water and land resources, transportation, and economic and regional development.

(2) The primary responsibility for implementing this policy rests with State and local governments."

of pollution abatement on behalf of the United States after following the procedures set out in the Section, "State and interstate action to abate pollution of interstate or navigable waters * * * shall not * * * be displaced by Federal enforcement action." Section 10(b), 33 U.S.C. 1160(b).

The procedures of Section 10 are complex and perhaps unnecessary to set out *in extenso*.¹² Very generally, two different modes of federal enforcement are possible. Where water quality standards and enforcement plans have been established by the states, or by the Administrator of the Environmental Protection Agency upon state default, the Administrator may request the Attorney General to bring an abatement action 180 days after finding that the standards are being violated and notifying the violators of the violation (Section 10(c)). Or, where pollution creates a danger to health or welfare, the Administrator may convene a conference of relevant state and interstate pollution control agencies (Section 10(d)) and recommend remedial action (Section 10(e)). If after six months a pollution danger remains, he may then convene a public hearing; once the hearing Board's recommendations are made known, at least six months more must be allowed to implement them (Section 10(f)). If the danger remains he may then request the Attorney General to bring an abatement action

¹² They are well explained in Barry, *The Evolution of the Enforcement Provisions of the Federal Water Pollution Control Act*, 68 Mich. L. Rev. 1103 (1970); see also, Hines, *Nor Any Drop to Drink: Public Regulation of Water Quality*, 52 Iowa L. Rev. 186, 432, 799 (1966-1967).

(Section 10(g)). It is quite clear that the actual bringing of a judicial enforcement action, in either case, is entirely discretionary with the Attorney General. It is undoubtedly for this reason that Congress was so careful to state in Section 10(b) that other remedies are not ordinarily precluded.

Section 12 of the Act, 33 U.S.C. 1162, deals specifically with pollution by "hazardous substances," a category to which mercury and its compounds belong. Although it calls for a Presidential report,¹³ Section 12 provides no effective means for federal control of such pollution (other, that is, than the procedures of Section 10; compare Section 11, 33 U.S.C. 1161, dealing with oil pollution). Rather, it explicitly preserves a right of action "to any person or agency under any provision of law for damages to any publicly or privately-owned property resulting from a discharge of any hazardous substance or from the removal of any such substance." Section 12(e), 33 U.S.C. 1162(e).

In contrast to these provisions, Section 13(f), 33 U.S.C. 1163(f), explicitly provides for federal preemption of state controls over standards for marine (shipboard) sanitation devices. Similarly, regulation of pollution by federal installations is made an exclusively federal concern. Barry, *op. cit. supra*, 68 Mich. L. Rev. at 1118. The conclusion is inescapable that despite its stress on federal-state cooperation as a means of dealing with pollution of interstate waters, the Federal Water Pollution Control Act has reserved

¹³ Under the statute the report was to have been filed November 1, 1970; we are informed that in all probability it will not be filed until mid-February, 1971.

to the states intact their traditional remedies. *Ibid.*; Hines, *op. cit.*, *supra*, 52 Iowa L. Rev. at 800; cf. *United States v. Interlake Steel Corp.*, 297 F. Supp. 912 (N.D. Ill.).

We believe this conclusion is valid in this case even though the pollution which Ohio seeks to control originates outside its borders. Again, this Court's cases make clear that the states have a remedy for such pollution, albeit they may have to meet a special standard of proof in order to establish their rights. *Missouri v. Illinois*, 200 U.S. 496, 520-521; *New York v. New Jersey*, *supra*; *New Jersey v. New York City*, *supra*. While it is certainly true that Congress has done much to encourage joint action, there is no evidence that it meant to foreclose the extraterritorial "nuisance" remedy or to limit its approving reference to local and state control to situations where those controls were exercised intrastate. Even apart from the wholly discretionary nature of the federal abatement action under Section 10, the remedy provided by that Section is deficient in several respects: it makes no provision for monetary awards for damages done during the pendency of the suit (cf. Barry, *op. cit. supra*, 68 Mich. L. Rev. at 1121); it is at best uncertain whether a monetary award to compensate for the expense of removing the pollutant can be obtained (compare Sections 10(h) and 12(e), 33 U.S.C. 1160(h), 1163(e) with Section 11(f), 33 U.S.C. 1161(f)); and unless the discharge is in violation of an

established water quality control standards " a Section 10 remedy cannot be obtained in less than fourteen months.¹⁵ Such a remedy is poorly suited to an emergency situation such as Ohio alleges in its complaint.¹⁶ Compare Barry, *op. cit. supra*, 68 Mich. L. Rev. 1108-1109, 1119.

¹⁴ Only Texas has an approved water quality control standard with specific limits for mercury and its compounds. While all states, including Ohio and Michigan, have catch-all provisions in their approved standards forbidding pollution by toxic or hazardous substances, the uncertainty of these general clauses makes it unlikely that they could be enforced through the relatively speedier procedures of Section 10(c).

¹⁵ Where violation of an established standard can be shown, Section 10(c) permits the Administrator to request suit 180 days after giving notice of the condition and seeking its abatement. Pp. 21-22, *supra*. But otherwise, there must be a three-week notice of conference; a conference and its report; a six-month period for abatement; if abatement does not occur, a three-week notice of hearing; a hearing and report; and a second six-month period for compliance before court action can be requested. *Ibid*.

¹⁶ That this Court's procedures are unlikely to be speedier, absent a showing justifying emergency relief, might be a consideration warranting refusal, in its discretion, to entertain the complaint, cf. *New York v. New Jersey*, *supra*, 256 U.S. at 313-314; Hines, *op. cit. supra*, 52 Iowa L. Rev. at 196-207, 434, although the federal remedy is deficient, as noted, in respects other than simple delay. Since this matter, however, is one of discretion rather than jurisdiction of the complaint, we do not address it.

IV. THIS COURT MAY EXERCISE JURISDICTION OVER A FOREIGN CORPORATION IF IT HAS SUFFICIENT CONTACTS WITH THE UNITED STATES TO SATISFY CONCEPTS OF DUE PROCESS AND IS AMENABLE TO SERVICE OF PROCESS

Defendants contend that this Court is without jurisdiction over Dow-Canada, a non-resident alien. We believe, however, that there is a legal basis for obtaining jurisdiction over Dow-Canada depending upon the resolution of factual questions upon which we express no opinion and which this Court need not resolve prior to the filing of a complaint.

It is important at the outset to distinguish between the questions whether personal jurisdiction may be exercised, and whether service of process can be obtained. One may readily imagine cases in which there would be sufficient basis for this Court to entertain an original action, but personal or appropriate substituted service of the proposed defendants could not be had. There might also be cases in which service would be possible, but the relationship of the defendant to the forum would be so remote that "maintenance of the suit [would] offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316. We address each of these issues in turn.

A. THE ISSUE WHETHER PERSONAL JURISDICTION MAY BE EXERCISED OVER DOW-CANADA DEPENDS ON THE EXISTENCE OF SUFFICIENT CONTACTS WITH THE UNITED STATES TO MEET THE REQUIREMENTS OF DUE PROCESS

The problem of personal jurisdiction over a non-resident alien corporation in an original action in this Court is apparently one of first impression. Dow-Canada asserts that, in the absence of a long-arm or similar statute, the "minimum contacts" test of "doing business," developed by *International Shoe Co. v. State of Washington*, *supra*, and subsequent cases largely in the context of such statutes, cannot be applied as the basis for the exercise of jurisdiction. Rather, it contends, the more stringent test of "doing business" employed prior to *International Shoe* is appropriate. But long-arm statutes are essentially concerned with service of process, not the basis of jurisdiction. If service issues are put aside, the only barrier to this Court's exercise of jurisdiction over a case apparently within its original jurisdiction would be the existence of facts making that exercise fundamentally unfair, within the meaning of the Due Process Clause of the Fifth Amendment.

The development of the due process concept of personal jurisdiction in the United States has been treated in depth by courts and legal commentators alike, and needs no general exposition here. See, *e.g.*, *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945); Note, *Jurisdiction of Federal Courts Over Foreign Corporations*, 69 Harv. L. Rev. 508 (1956). Of special importance to the present discussion, however, is the developing recognition by lower federal courts that where federal jurisdiction of the

subject matter is founded on other than the diverse citizenship of the parties, a federal district court will have personal jurisdiction over any properly-served defendant within the permissible limits of the due process clause of the Fifth Amendment. See, *e.g.*, *Fraleigh v. Chesapeake & O. Ry. Co.*, 397 F. 2d 1 (C.A. 3); *Lone Star Package Car Co. v. Baltimore & O. R. Co.*, 212 F. 2d 147 (C.A. 5). See, also, 4 Wright & Miller, *Federal Practice and Procedure*, § 1075.

Each of the several federal court cases Dow-Canada cites in support of its contrary proposition¹⁷ are cases where the jurisdiction of the federal court rested on diversity of citizenship. The courts of appeal are in general agreement that a defendant in a diversity case is amenable to the personal jurisdiction of the court only if he would be so amenable in the courts of the State in which the district court is sitting.¹⁸ The rationale for this proposition is similar to the outcome-determinative test promulgated by *Guaranty Trust*

¹⁷ *Beatty v. M.S. Steel Co.*, 401 F. 2d 157, 161 (C.A. 4, 1968), certiorari denied, 89 S. Ct. 686; *Bowman v. Curt G. Joa Inc.*, 361 F. 2d 706, 714 (C.A. 4, 1969); *Roberts v. Evans Case Co.*, 218 F. 2d 893 (C.A. 7, 1955); *Pulson v. American Rolling Mill*, 170 F. 2d 193, 195 (C.A. 1, 1948); *Bornze v. Nardis Sportswear Inc.*, 165 F. 2d 33 (C.A. 2, 1948). See Dow-Canada Br. 18 and 22.

¹⁸ See *Arrowsmith v. United Press International*, 320 F. 2d 219 (C.A. 2, 1963); Foster, *Judicial Economy: Fairness and Convenience of Place of Trial: Long-Arm Jurisdiction in District Courts*, 47 F.R.D. 73, 96 n. 75 (1968); Annot., *Federal or State Law as Controlling in Diversity Action, Whether Foreign Corporation is Amenable to Service of Process in State*, 6 A.L.R. 3d 1103, 1109, 1114 (1966). But see *Arrowsmith v. United Press International*, *supra*, pp. 234-244 (dissenting opinion of Clark, C.J.); *St. Clair v. Richter*, 250 F.Supp. 148 (N.D. Va. 1966); Green, *Federal Jurisdiction In Personam of Corporations and Due Process*, 14 Vand. L.Rev. 967 (1961); Note,

Co. v. York, 326 U.S. 99 (1945):¹⁹ (1) a State is not required by federal constitutional provisions to open its courts to a transitory action arising out of State, *Kenny v. Alaska Airlines*, 132 F.Supp. 838 (S.D. Cal. 1955) (removal case); (2) "[s]tate statutes determining what foreign corporations may be sued, for what, and by whom * * * represent a balancing of various considerations—for example, affording a forum for wrongs connected with the state and conveniencing resident plaintiffs, while avoiding the discouragement of activity within the state by foreign corporations," *Arrowsmith v. United Press International*, *supra*, p. 226; (3) the purpose of diversity jurisdiction is to provide a more suitable forum for what are primarily state cases but which involve citizens of different states, *id.* pp. 226-227; and (4) there is "* * * no federal policy that should lead federal courts in diversity cases to override valid state laws as to the subjection of foreign corporations to suit, in the absence of direction by federal statute or rule," *id.* p. 226.

The rationale for limiting federal courts exercising diversity jurisdiction to state notions of personal

Doing Business as a Test of Venue and Jurisdiction over Foreign Corporations in the Federal Courts, 56 Colum. L.Rev. 394 (1956); Note, *Jurisdiction of Federal Courts Over Foreign Corporations*, *supra*.

¹⁹ Of course, it is generally conceded that the doctrine of *Eric R.R. v. Tompkins*, 304 U.S. 64 (1938), does not prohibit Congress from broadening the ability of federal district courts exercising diversity jurisdiction to obtain personal jurisdiction over defendants not personally amenable in the courts of the forum state. *Arrowsmith v. United Press International*, *supra*, p. 226; see *Riverbank Labs. v. Hardwood Prods. Corp.*, 350 U.S. 1003 (1956), opinion amended, 350 U.S. 1012 (1956); Green, *supra*, p. 980; Foster, *supra*, pp. 80-81 & n. 18.

jurisdiction is not relevant, however, where subject matter jurisdiction is present on a basis other than diversity. In a relatively recent Sherman Act case in the federal district court in Ohio, *Edward J. Moriarty & Co. v. General Tire & Rubber Co.*, 289 F. Supp. 381, 389-390 (S.D. Ohio 1967), the judge reasoned:

It is this Court's opinion that at first blush, it should be irrelevant whether or not [one of the potential defendants'] activities in Ohio meet the tests set out in [the Ohio long arm statute]. It is our opinion that a federal district court may acquire jurisdiction over the person of a defendant incorporated under the laws of a foreign country without regard to contacts of the corporation with the state where the courts sits. This is especially true in a case where the cause of action rests upon a federally-created right, such as this one, and where national uniformity in enforcing that right should be the true guideline.

A court is a part of the judicial branch of the government of some state or nation. That government may have undertaken to give the court power to entertain a certain action or actions, but, in order for the court to have jurisdiction, the state or nation must have judicial jurisdiction over the parties.

Thus, in our view, the judicial jurisdiction over the person of the defendant does not relate to the geographical power of the particular court which is hearing the controversy, but to the power of the unit of government of which that court is a part. The limitations of the concept of personal jurisdiction are a consequence of territorial limitations on the power of the

respective forums. Thus, as applied to the states, the constitutional test for personal jurisdiction involves a determination as to whether the defendant has certain minimal contacts *with the forum state*, such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. State of Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945). [Emphasis in the original.]

By the same token, we feel that the appropriate inquiry to be made in a federal court where the suit is based upon a federally created right is whether the defendant has certain minimal contacts *with the United States*, so as to satisfy due process requirements under the Fifth Amendment. * * * [Emphasis added.]

See also *Gkiasis v. Steamship Yiosonas*, 342 F. 546, 549 (C.A. 4, 1965); *First Flight Co. v. National Car-loading Corp.*, 209 F. Supp. 730 (E.D. Tenn. 1962); *Goldberg v. Mutual Readers League, Inc.*, 195 F. Supp. 778, 781 (E.D. Pa. 1961); *Rayco Manufacturing Co. v. Chicopee Manufacturing Co.*, 148 F. Supp. 588, 590-591 (S.D. N.Y. 1957).

We can perceive no reason why the test of personal jurisdiction in this Court should be any more restrictive than the Constitution requires. The Constitution appoints this Court as the forum for resolution of controversies between a State and citizens of other states or foreign countries. Its jurisdiction over those controversies is as broad as the Constitution permits. It is in no sense a substitute forum which ought for reasons of comity to follow restrictions on jurisdiction which may have been imposed on state courts.

As already set out, international law recognizes the liability of individuals for the extra-territorial consequences of their acts; no reason of state requires that this Court adopt a more restrictive theory of jurisdiction over foreign corporations charged with producing such consequences in the United States than the Constitution commands as to all defendants in federal courts.²⁰ In sum, no federal policy demands that this Court's power to subject defendants to its jurisdiction be limited by anything save the Fifth Amendment of the United States Constitution.

There remains the issue whether the requirements of due process would be met if jurisdiction were exercised in this case. Cases beginning with *International Shoe, supra*, which have developed the "minimum contacts" doctrine suggest two possible bases for the exercise of jurisdiction. First, Dow-Canada's sales and other business in the United States, as well as the fact that it is wholly owned by an American corporation, may justify jurisdiction. See *e.g.*, *McGee v. International Life Ins. Co.*, 355 U.S. 220. Second, jurisdiction might also be based on the alleged commission of tortious acts in the United States. See *e.g.*, *Hess v. Pawloski*, 274 U.S. 352; *Elkart Engineering Co., v. Dornier Werke*, 343 F. 2d 861 (C.A. 5); *Nelson v. Miller*, 11 Ill. 2d 378, 143 N.E. 2d 673. See, also, 4 Wright & Miller, *supra*, §§ 1066-

²⁰ See, *e.g.*, *United States v. Scophony Corp. of America*, 333 U.S. 795; *National Gas Appliance Corp. v. AB Electrolux*, 270 F. 2d 472 (C.A. 4); *Seilon, Inc. v. Breme S.P.A.*, 271 F. Supp. 516 (N.D. Ohio); *Alfred Hofman & Co. v. Karl Meyer Erste Hessische Wirkmaschinen fabrik GMBH*, 159 F. Supp. 77 (D.N.J.).

1069; 2 Moore, *Federal Practice* ¶¶ 4.25, 4.41 [1]–[3]. What is important to note, however, is that the critical issue is a factual one. While the United States takes no position on that question,²¹ we see no reason why, as a factual question, it ought not to be resolved after the complaint has been filed, in accordance with the usual practice.

**B. WHETHER EFFECTIVE SERVICE MAY BE HAD UPON DOW-CANADA
DEPENDS UPON THE RESOLUTION OF FACTUAL ISSUES NOT AP-
PROPRIATE FOR DECISION AT THIS TIME**

Assuming that jurisdiction may be obtained, the Rules of this Court provide an appropriate procedural vehicle for service upon Dow-Canada. Rule 9(2) provides that the Federal Rules of Civil Procedure, “* * * where their application is appropriate, may be taken as a guide to procedure in original actions in this court”. See *Utah v. United States*, 394 U.S. 89, 94 (1969).²²

Rule 4 of the Federal Rules of Civil Procedure governs service of process in federal district courts. Rule 4(d)(3) provides for personal service upon a foreign corporation “by delivering a copy of the summons and

²¹ Ohio alternatively contends that personal jurisdiction over Dow-Canada may be obtained through Dow-United States, which allegedly “controls the actions” of Dow-Canada. We express no opinion concerning the ultimate resolution of this issue, since it too depends in part on a factual determination. See, Note, *Jurisdiction—Long-Arm Statutes—Corporate Affiliation as a Basis for Assuming Jurisdiction*, 14 Wayne L. Rev. 1228 (1968).

²² Supreme Court Rule 33(1) provides for service of “any pleading, motion, notice, brief, or other document” upon opposing counsel, either personally or by mail. Since this Rule does not provide for service directly on adverse parties, it would appear inapplicable as a guide to means for original service of process.

of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process * * *. ²³ Ohio contends that the Directors of Dow-Canada, a majority of whom reside within the United States at Midland, Michigan, are appropriate persons for service under this rule. ²⁴ The contention, again, raises essentially factual questions which, like the issue regarding the sufficiency of contacts for assertion of jurisdiction, appropriately may be resolved after a complaint is filed.

²³ Alternative methods provided by Rules 4(d)(7) and (e) are not appropriate because they are tied to particular state rules or federal statutes. There are none which apply to this Court's original jurisdiction.

²⁴ The general standard is that "service should be made upon a representative so integrated with the organization that he will know what to do with the papers." *American Football League v. National Football League*, 27 F.R.D. 264, 269 (D. Md.). It has been held that service upon a director is not adequate under Rule 4(d)(3), where the director served was one of 200 members of the board and was not an officer. *Pacific Lanes, Inc. v. Bowling Proprietors Ass'n of America*, 248 F. Supp. 347 (D. Ore.). But where a director has other corporate responsibilities such that he is sufficiently "integrated" into the corporation, service on him would seem to be sufficient. See, generally, 4 Wright & Miller, *supra*, §§ 1101-1102; 2 Moore, *supra*, ¶ 4.22[2]. Furthermore, service on a number of directors may be satisfactory to meet the requirements of the Rule. There is no indication here whether any of the directors of Dow-Canada who reside in Midland, Michigan, are also officers of that corporation. However, the total number of directors is 12. Ohio Br., App. 13a. Of the seven living in Midland, six were also directors (and four of them were officers) of Dow-United States as of December 31, 1969. See Moody, *Industrial Manual*, pp. 1572-1573.

CONCLUSION

For the reasons stated, there is no legal bar to this Court's granting Ohio's motion for leave to file the complaint in this original action.

Respectfully submitted.

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DECEMBER 1970.

APPENDIX

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

United States Constitution, Article 3, § 2:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; —to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

* * * * *

28 U.S.C. § 1251:

* * * * *

(b) The Supreme Court shall have original but not exclusive jurisdiction of:

* * * * *

(3) All actions or proceedings by a State against the citizens of another State or against aliens.

Section 1 of the Federal Water Pollution Control Act, 33 U.S.C. 1151:

(a) The purpose of this chapter is to enhance the quality and value of our water resources and to establish a national policy for the prevention, control, and abatement of water pollution.

(b) In connection with the exercise of jurisdiction over the waterways of the Nation and in consequence of the benefits resulting to the public health and welfare by the prevention and control of water pollution, it is declared to be the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States in preventing and controlling water pollution, to support and aid technical research relating to the prevention and control of water pollution, and to provide Federal technical services and financial aid to State and interstate agencies and to municipalities in connection with the prevention and control of water pollution. * * *

(c) Nothing in this chapter shall be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

Section 10 of the Federal Water Pollution Control Act, 33 U.S.C. 1160:

(a) The pollution of interstate or navigable waters in or adjacent to any State or States (whether the matter causing or contributing to such pollution is discharged directly into such waters or reaches such waters after discharge into a tributary of such waters), which endangers the health or welfare of any persons, shall be subject to abatement as provided in this chapter.

(b) Consistent with the policy declaration of this chapter, State and interstate action to abate pollution of interstate or navigable waters shall be encouraged and shall not, except as otherwise provided by or pursuant to court order under subsection (h) of this section, be displaced by Federal enforcement action.

(c)(1) If the Governor of a State or a State water pollution control agency files, within one year after October 2, 1965, a letter of intent that such State, after public hearings, will before June 30, 1967, adopt (A) water quality criteria applicable to interstate waters or portions thereof within such State, and (B) a plan for the implementation and enforcement of the water quality criteria adopted, and if such criteria and plan are established in accordance with the letter of intent, and if the Secretary ²⁵ determines that such State criteria and plan are consistent with paragraph (3) of this subsection, such State criteria and plan shall thereafter be the water quality standards applicable to such interstate waters or portions thereof.

(2) If a State does not (A) file a letter of intent or (B) establish water quality standards in accordance with paragraph (1) of this subsection, or if the Secretary or the Governor of any State affected by water quality standards established pursuant to this subsection desires a revision in such standards, the Secretary may, after reasonable notice and a conference of representatives of appropriate Federal departments and agencies, interstate agencies, States, municipalities and industries involved, prepare regulations setting forth standards of water quality to be applicable to interstate waters or portions thereof. If, within six months from the date the Secretary publishes such regulations,

²⁵ Under Reorganization Plan No. 3 of 1970 the functions of the Secretary have been transferred to the Administrator of the Environmental Protection Agency, effective December 2, 1970, 35 Fed. Reg. 15,623 (Oct. 16, 1970).

the State has not adopted water quality standards found by the Secretary to be consistent with paragraph (3) of this subsection, or a petition for public hearing has not been filed under paragraph (4) of this subsection, the Secretary shall promulgate such standards.

(3) Standards of quality established pursuant to this subsection shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. In establishing such standards the Secretary, the Hearing Board, or the appropriate State authority shall take into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other legitimate uses. In establishing such standards the Secretary, the hearing board, or the appropriate State authority shall take into consideration their use and value for navigation.

(4) If at any time prior to 30 days after standards have been promulgated under paragraph (2) of this subsection, the Governor of any State affected by such standards petitions the Secretary for a hearing, the Secretary shall call a public hearing, to be held in or near one or more of the places where the water quality standards will take effect, before a Hearing Board of five or more persons appointed by the Secretary. Each State which would be affected by such standards shall be given an opportunity to select one member of the Hearing Board. The Department of Commerce and other affected Federal departments and agencies shall each be given an opportunity to select a member of the Hearing Board and not less than a majority of the Hearing Board shall be persons other than officers or employees of the Department of the Interior. * * * Notice of such hearing shall be published in the Federal Register and given to the State water pollution control agencies, interstate agencies and municipalities involved at least 30 days prior to the date of such hearing.

On the basis of the evidence presented at such hearing, the Hearing Board shall make findings as to whether the standards published or promulgated by the Secretary should be approved or modified and transmit its findings to the Secretary. If the Hearing Board approves the standards as published or promulgated by the Secretary, the standards shall take effect on receipt by the Secretary of the Hearing Board's recommendations. If the Hearing Board recommends modifications in the standards as published or promulgated by the Secretary, the Secretary shall promulgate revised regulations setting forth standards of water quality in accordance with the Hearing Board's recommendations which will become effective immediately upon promulgation.

(5) The discharge of matter into such interstate waters or portions thereof, which reduces the quality of such waters below the water quality standards established under this subsection (whether the matter causing or contributing to such reduction is discharged directly into such waters or reaches such waters after discharge into tributaries of such waters), is subject to abatement in accordance with the provisions of paragraph (1) or (2) of subsection (g) of this section, except that at least 180 days before any abatement action is initiated under either paragraph (1) or (2) of subsection (g) of this section as authorized by this subsection, the Secretary shall notify the violators and other interested parties of the violation of such standards. In any suit brought under the provisions of this subsection the court shall receive in evidence a transcript of the proceedings of the conference and hearing provided for in this subsection, together with the recommendations of the conference and Hearing Board and the recommendations and standards promulgated by the Secretary, and such additional evidence, including that relating to the alleged violation of the standards, as it deems

necessary to a complete review of the standards and to a determination of all other issues relating to the alleged violation. The court, giving due consideration to the practicability and to the physical and economic feasibility of complying with such standards, shall have jurisdiction to enter such judgment and orders enforcing such judgment as the public interest and the equities of the case may require.

* * * * *

(d) (1) Whenever requested by the Governor of any State or a State water pollution control agency, or (with the concurrence of the Governor and of the State water pollution control agency for the State in which the municipality is situated) the governing body of any municipality, the Secretary shall, if such request refers to pollution of waters which is endangering the health or welfare of persons in a State other than that in which the discharge or discharges (causing or contributing to such pollution) originates, give formal notification thereof to the water pollution control agency and interstate agency, if any, of the State or States where such discharge or discharges originate and shall call promptly a conference of such agency or agencies and of the State water pollution control agency and interstate agency, if any, of the State or States, if any, which may be adversely affected by such pollution. Whenever requested by the Governor of any State, the Secretary shall, if such request refers to pollution of interstate or navigable waters which is endangering the health or welfare of persons only in the requesting State in which the discharge or discharges (causing or contributing to such pollution) originate, give formal notification thereof to the water pollution control agency and interstate agency, if any, of such State and shall promptly call a conference of such agency or agencies, unless, in the judgment of the Secretary, the effect of such pollution on the legitimate uses of the wa-

ters is not of sufficient significance to warrant exercise of Federal jurisdiction under this section. The Secretary shall also call such a conference whenever, on the basis of reports, surveys, or studies, he has reason to believe that any pollution referred to in subsection (a) of this section and endangering the health or welfare of persons in a State other than that in which the discharge or discharges originate is occurring; or he finds that substantial economic injury results from the inability to market shellfish or shellfish products in interstate commerce because of pollution referred to in subsection (a) of this section and action of Federal, State, or local authorities.

(2) Whenever the Secretary, upon receipt of reports, surveys, or studies from any duly constituted international agency, has reason to believe that any pollution referred to in subsection (a) of this section which endangers the health or welfare of persons in a foreign country is occurring, and the Secretary of State requests him to abate such pollution, he shall give formal notification thereof to the State water pollution control agency of the State in which such discharge or discharges originate and to the interstate water pollution control agency, if he believes that such pollution is occurring in sufficient quantity to warrant such action. The Secretary, through the Secretary of State, shall invite the foreign country which may be adversely affected by the pollution to attend and participate in the conference, and the representative of such country shall for the purpose of the conference and any further proceeding resulting from such conference, have all the rights of a State water pollution control agency. This paragraph shall apply only to a foreign country which the Secretary determines has given the United States essentially the same rights with respect to the prevention and control of water pollution occurring in that coun-

try as is given that country by this paragraph. Nothing in this paragraph shall be construed to modify, amend, repeal, or otherwise affect the provisions of the 1909 Boundary Waters Treaty between Canada and the United States or the Water Utilization Treaty of 1944 between Mexico and the United States (59 Stat. 1219), relative to the control and abatement of water pollution in waters covered by those treaties.

(3) The agencies called to attend such conference may bring such persons as they desire to the conference. In addition, it shall be the responsibility of the chairman of the conference to give every person contributing to the alleged pollution or affected by it an opportunity to make a full statement of his views to the conference. Not less than three weeks' prior notice of the conference date shall be given to such agencies.

(4) Following this conference, the Secretary shall prepare and forward to all the water pollution control agencies attending the conference a summary of conference discussions including (A) occurrence of pollution of interstate or navigable waters subject to abatement under this chapter; (B) adequacy of measures taken toward abatement of the pollution; and (C) nature of delays, if any, being encountered in abating the pollution.

(e) If the Secretary believes, upon the conclusion of the conference or thereafter, that effective progress toward abatement of such pollution is not being made and that the health or welfare of any persons is being endangered, he shall recommend to the appropriate State water pollution control agency that it take necessary remedial action. The Secretary shall allow at least six months from the date he makes such recommendations for the taking of such recommended action.

(f)(1) If, at the conclusion of the period so allowed, such remedial action has not been taken or action which in the judgment of the Secretary is reasonably calculated to secure abatement of such pollution has not been taken, the Secretary shall call a public hearing, to be held in or near one or more of the places where the discharge or discharges causing or contributing to such pollution originated, before a Hearing Board of five or more persons appointed by the Secretary. Each State in which any discharge causing or contributing to such pollution originates and each State claiming to be adversely affected by such pollution shall be given an opportunity to select one member of the Hearing Board and at least one member shall be a representative of the Department of Commerce, and not less than a majority of the Hearing Board shall be persons other than officers or employees of the Department of the Interior. At least three weeks' prior notice of such hearing shall be given to the State water pollution control agencies and interstate agencies, if any, called to attend the aforesaid hearing and the alleged polluter or polluters. It shall be the responsibility of the Hearing Board to give every person contributing to the alleged pollution or affected by it an opportunity to make a full statement of his views to the Hearing Board. On the basis of the evidence presented at such hearing, the Hearing Board shall make findings as to whether pollution referred to in subsection (a) of this section is occurring and whether effective progress toward abatement thereof is being made. If the Hearing Board finds such pollution is occurring and effective progress toward abatement thereof is not being made it shall make recommendations to the Secretary concerning the measures, if any, which it finds

to be reasonable and equitable to secure abatement of such pollution. The Secretary shall send such findings and recommendations to the person or persons discharging any matter causing or contributing to such pollution, together with a notice specifying a reasonable time (not less than six months) to secure abatement of such pollution, and shall also send such findings and recommendations and such notice to the State water pollution control agency and to the interstate agency, if any, of the State or States where such discharge or discharges originate.

* * * * *

(g) If action reasonably calculated to secure abatement of the pollution within the time specified in the notice following the public hearing is not taken, the Secretary—

(1) in the case of pollution of waters which is endangering the health or welfare of persons in a State other than that in which the discharge or discharges (causing or contributing to such pollution) originate, may request the Attorney General to bring a suit on behalf of the United States to secure abatement of pollution, and

(2) in the case of pollution of waters which is endangering the health or welfare of persons only in the State in which the discharge or discharges (causing or contributing to such pollution) originate, may, with the written consent of the Governor of such State, request the Attorney General to bring a suit on behalf of the United States to secure abatement of the pollution.

(h) The court shall receive in evidence in any such suit a transcript of the proceedings before the Board and a copy of the Board's recommendations and shall receive such further evidence as the court in its discretion

deems proper. The court, giving due consideration to the practicability and to the physical and economic feasibility of securing abatement of any pollution proved, shall have jurisdiction to enter such judgment, and orders enforcing such judgment, as the public interest and the equities of the case may require.

* * * * *

Section 12 of the Federal Water Pollution Control Act, 33 U.S.C. 1162:

(a) The President shall, in accordance with subsection (b) of this section, develop, promulgate, and revise as may be appropriate, regulations (1) designating as hazardous substances, other than oil as defined in section 1161 of this title, such elements and compounds which, when discharged in any quantity into or upon the navigable waters of the United States or adjoining shorelines or the waters of the contiguous zone, present an imminent and substantial danger to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, shorelines, and beaches; and (2) establishing, if appropriate, recommended methods and means for the removal of such substances.

* * * * *

(e) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, onshore or offshore facility to any person or agency under any provision of law for damages to any publicly- or privately-owned property resulting from a discharge of any hazardous substance or from the removal of any such substance.

* * * * *

(g) The President shall submit a report to the Congress, together with his recommendations, not later than November 1, 1970, on the

need for, and desirability of, enacting legislation to impose liability for the cost of removal of hazardous substances discharged from vessels and onshore and offshore facilities subject to this section including financial responsibility requirements. In preparing this report, the President shall conduct an accelerated study which shall include, but not be limited to, the method and measures for controlling hazardous substances to prevent this discharge, and the most appropriate measures for (1) enforcement (including the imposition of civil and criminal penalties for discharges and for failure to notify) and (2) recovery of costs incurred by the United States if removal is undertaken by the United States. In carrying out this study, the President shall consult with the interested representatives of the various public and private groups that would be affected by such legislation as well as other interested persons.

Rule 9(2) of the Rules of the Supreme Court:

The form of pleadings and motions in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, and in other respects those rules, where their application is appropriate, may be taken as a guide to procedure in original actions in this court.

Rule 4 of the Federal Rules of Civil Procedure:

PROCESS

(a) Summons: Issuance. Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service

* * * * *

(d) Summons: Personal Service. The summons and complaint shall be served together.
* * * Service shall be made as follows:

* * * * *

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

* * * * *

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E. ROBERT SEAY, CL

In the Supreme Court of the United States

No. 41, Original.

OCTOBER TERM, 1969.

STATE OF OHIO, *ex rel.*, PAUL W. BROWN,
Plaintiff,

vs.

WYANDOTTE CHEMICALS CORPORATION,
DOW CHEMICAL COMPANY OF CANADA, LIMITED
and
THE DOW CHEMICAL COMPANY,
Defendants.

**BRIEF OF THE DOW CHEMICAL COMPANY
IN REPLY TO BRIEF OF THE UNITED STATES
AS AMICUS CURIAE.**

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TABLE OF CONTENTS.

Statement	1
I. Under Principles of International Law Applicable to Ohio's Proposed Complaint, Ohio is Not the Proper Party to Initiate the Proposed Suit	2
II. Adjudication of Ohio's Common Law Interests in Lake Erie, as <i>Parens Patriae</i> For Its Citizens, Could Involve this Court in Litigation Initiated by the States of New York, Pennsylvania and Michigan, as Well as the Province of Ontario Against Innumerable Defendants, as Well as Raising Diplomatic Issues Heretofore Resolved By the 1909 Treaty and the International Joint Commission	6
III. Ohio's Claim For Damages as Proprietor is Not Founded Upon Legal Principles Which Will Permit the Recovery of Damages	9
IV. The Boundary Waters Treaty of 1909, Through the International Joint Commission and the Joint References of April 1, 1946 and October 7, 1964 By the Governments of Canada and the United States, Provides an Alternative Suitable Forum Whereby This Court, Exercising Its Discretion, May Properly Refuse to Entertain Ohio's Complaint	17
Conclusion	23
Appendix 1. Excerpt from Report of The International Joint Commission United States and Canada On The Pollution of Boundary Waters	24
Appendix 2. Text of Letter Containing a Reference Calling for a Report on Pollution in Lake Erie, Lake Ontario and the International Section of the St. Lawrence River	26

TABLE OF AUTHORITIES.

Cases.

<i>Anthony v. Veatch</i> , 220 P.2d 493 (Sup. Ct. Ore. 1950)	10
<i>Colorado vs. Kansas</i> , 320 U.S. 383 (1943)	7
<i>Georgia vs. Pennsylvania R.R.</i> , 324 U.S. 439 (1945)	10
<i>Georgia vs. Tennessee Copper Co.</i> , 206 U.S. 230 (1907)	9
<i>Missouri vs. Holland</i> , 252 U.S. 416 (1920)	11
<i>North Dakota vs. Minnesota</i> , 263 U.S. 365 (1923)	11
<i>Organized Village of Kake vs. Egan</i> , 174 F. Supp. 500 (D. Alaska 1959)	11
<i>Pennsylvania vs. West Virginia</i> , 262 U.S. 553 (1923)	9
<i>Sanitary District of Chicago vs. United States</i> , 266 U.S. 405 (1925)	4
<i>United States vs. California</i> , 332 U.S. 19 (1947)	4
<i>United States vs. Shauver</i> , 214 F. 154 (D.C. E.D. Ark. 1914)	11

Treaties.

Boundary Waters Treaty, 1909; between the United States and Great Britain, proclaimed May 13, 1910, 36 Stat. 2448; TS 548	3, 6
---	------

Statutes.

Federal Water Pollution Control Act, 33 U.S.C. 1151 <i>et seq.</i>	3, 4
---	------

Books and Periodicals.

Bloomfield and Fitzgerald, <i>Boundary Water Problems of Canada and the United States</i> , pages 17-37 ..	17
ENVIRONMENT, Nov. 1970 at S-1	14
Freund, <i>Book Review</i> , 3 J. LEGAL ED. 643, 644 n. 2 (1951)	10
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Waite, <i>The International Joint Commission—Its Practice and Its Impact on Land Use</i> , 13 BUFFALO LAW REVIEW, pages 111-112 (1963-4)	18
Wall Street Journal, December 16, 1970	14

Miscellaneous.

<i>Documents on the Use and Control of the Waters of Interstate and International Streams: Compacts, Treaties and Adjudications</i> , Boundary Waters Treaty, 1909 (1956)	17-18
<i>Proceedings of the Conference on International and Interstate Regulation of Water Pollution—March 12-13, 1970</i> , Columbia University School of Law ..	21
Report, <i>Investigation of Mercury in the St. Clair River-Lake Erie Systems</i> , prepared by the United States Department of the Interior, Federal Water Pollution Control Administration presented at the June 3, 1970, Conference on Lake Erie in Detroit, Michigan	13

Report to Special Commission (1966-7) authorized under the <i>National Science Foundation Act of 1960</i> (Act of May 10, 1950, ch 171, § 2, 64 Stat. 149, as amended, 42 U.S.C. 1861 to 1875) en- titled, <i>Weather Modification, Law Controls, Ope- rations, Report to the Special Commission on Weather Modification</i>	9
1970 Trade Cases 73 at page 340 (September 25, 1970)	10

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THE DOW CHEMICAL COMPANY,

Defendants.

BRIEF OF THE DOW CHEMICAL COMPANY IN REPLY TO BRIEF OF THE UNITED STATES AS AMICUS CURIAE.

STATEMENT.

The Solicitor General, in the Brief filed on behalf of the United States as *amicus curiae*, has concluded “* * * there is no legal bar to this Court’s granting Ohio’s motion for leave to file the complaint in this original action.” See Conclusion, Brief of the United States, Page 34. (*Italics supplied.*)

In reaching the conclusion stated, the Solicitor General argues that Ohio, as *parens patriae*, unless precluded by treaty or federal law, “* * * may validly apply its common law to actors outside its territory who create a public nuisance within its boundaries.” Brief of the United States, second paragraph, Page 6.

The Solicitor General bases the above statement upon the tenuous conclusion that "* * * so long as the federal government has not prescribed, by treaty or statute, a system of regulation of water pollution which precludes state action in this field, * * * Ohio may apply its common law against those whose acts created nuisance within the state." Brief of the United States, page 13.

Despite the above statements, there runs throughout the Brief of the United States an underscoring that this Court, upon consideration of the complexity of the issues and problems presented, could, exercising its discretion, refuse to entertain Ohio's Complaint.

I. UNDER PRINCIPLES OF INTERNATIONAL LAW APPLICABLE TO OHIO'S PROPOSED COMPLAINT, OHIO IS NOT THE PROPER PARTY TO INITIATE THE PROPOSED SUIT.

The *parens patriae* argument advanced by the Solicitor General (Brief of the United States, Pages 7-13) runs counter to the principles of international law. On this point, it is submitted the cases upon which Ohio and the Solicitor General rely (Pages 7-13 of the Brief of the United States) are not in point or determinative re Ohio's Motion. The cases cited are not authority for establishment of the conclusion that Ohio, as *parens patriae* for its citizens, may apply Ohio common law in seeking to obtain a judgment against a foreign national (Dow Canada) for the claimed results of an alleged nuisance which originated in Ontario, Canada.

Ohio's proposed Complaint involves issues which are extra-territorial. The international issues raised by the proposed litigation (pollution of international boundary waters) have long been of paramount interest to the governments of Canada and the United States. Joint

References to the International Joint Commission by the United States and Canada, April 1, 1946, and October 7, 1964, Appendix 1 & 2 attached.

Application of Ohio's common law would cloak Ohio, a quasi-sovereign, with the sovereign power reserved to the United States in dealing with foreign affairs. Such abdication and yielding of sovereign power by the federal government to Ohio not only establishes a singular precedent, but is contrary to principles of international law and runs counter to Articles II and IV of the *Boundary Waters Treaty 1909*.

The conclusion that *Ohio's common law* should be applicable and decisive, in adjudicating Ohio's claims with reference to a claimed public nuisance allegedly resulting in Ohio's portion of Lake Erie because of the introduction of mercury or compounds thereof into the Canadian side of the St. Clair River, will undoubtedly cause the Canadian government grave concern. Canada will certainly want to question the proposed application of Ohio's common law by Ohio, a quasi-sovereign, and the propriety of courts in the United States pre-empting Canada's sovereign right to exercise its own jurisdiction and to apply Ontario law to deal with the boundary waters pollution problem which Ohio asks leave to litigate. This is particularly true if the government of Canada diplomatically suggests Article II of the *Boundary Waters Treaty of 1909* is applicable and controlling of the issues raised by Ohio. See App. 1 and 2.

The Federal Water Pollution Control Act, as amended (1970), does not give Ohio the right to assert its common law in the proposed litigation. The provisions extending federal enforcement authority to international pollution are limited solely to controlling the conduct of the citizens and inhabitants of the United States within the territory of the United States. The legislation does not

have extra-territorial application upon the conduct of Dow Canada, an alien, in connection with the operation of its plant in Sarnia, Ontario, Canada or its use or the results of its use of the Canadian portion of the St. Clair River.

The Act of 1948, as amended, specifically provides in Section 1160 (d) (2) that, "** * * Nothing in this paragraph should be construed to modify, amend, repeal, or otherwise affect the provisions of the 1909 Boundary Waters Treaty between Canada and the United States. * * **" (Emphasis supplied); and further provides in Section 1174, "*This chapter shall not be construed as * * * (3) affecting or impairing the provisions of any treaty of the United States.*" (Emphasis supplied.)

When an extra-territorial issue is raised, only the federal government has inherent power to negotiate such an issue. The federal government's complete sovereign power over foreign affairs makes it imperative that its sovereign interests be regarded as paramount over the interests of a quasi-sovereign (Ohio). *United States vs. California*, 332 U.S. 19 (1947).

In the case of *Sanitary District of Chicago vs. United States*, 266 U.S. 405 (1925), Mr. Justice Holmes said:

"This is not a controversy between equals. The United States is asserting its sovereign power to regulate commerce and to control the navigable waters within its jurisdiction. It has a standing in this suit not only to remove obstruction to interstate and foreign commerce, the main ground, which we will deal with last, but also to carry out treaty obligations to a foreign power bordering upon some of the Lakes concerned, and, it may be, also on the footing of an ultimate sovereign interest in the Lakes." (Emphasis supplied.)

"With regard to the second ground, the Treaty of January 11, 1909, with Great Britain, expressly pro-

vides against uses 'affecting the natural level or flow of boundary waters' without the authority of the United States or the Dominion of Canada within their respective jurisdictions and the approval of the International Joint Commission agreed upon therein. As to its ultimate interest in the Lakes the reasons seem to be stronger than those that have established a similar standing for a State, as the interests of the nation are more important than those of any State. *In re Debs*, 158 U.S. 564, 584, 585, 599. *Georgia v. Tennessee Copper Co.*, 206 U.S. 230. *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355. *Marshall Dental Manufacturing Co. v. Iowa*, 226 U.S. 460, 462 (Emphasis supplied.)

"The main ground is the authority of the United States to remove obstructions to interstate and foreign commerce. There is no question that this power is superior to that of the States to provide for the welfare or necessities of their inhabitants. In matters where the States may act the action of Congress overrides what they have done. *Monongahela Bridge Co. v. United States*, 216 U.S. 177. *Second Employers' Liability Cases*, 223 U.S. 1, 53. But in matters where the national importance is imminent and direct even where Congress has been silent the States may not act at all. *Kansas City Southern Ry. Co. v. Kaw Valley Drainage District*, 233 U.S. 75, 79." *Sanitary District of Chicago v. United States*, 266 U.S. 405 at pages 425-426. (Emphasis supplied.) See also, *Missouri v. Holland*, 252 U.S. 416 (1920); *First Iowa Hydro-Electric Co-op v. F.P.C.*, 328 U.S. 152 (1946). To the same effect see *Kansas v. Colorado*, 185 U.S. 125, 144 (1902); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907) ("[T]he alternate to force is a suit in this Court").

Even the principles of international comity or equitable apportionment do not dictate Ohio's common law can properly be applied or controlling in a suit seeking

remedial action involving an alleged extra-territorial act of pollution by a foreign national, to-wit Dow Canada. Article II of the *Boundary Waters Treaty 1909*, specifically reserves Canada's sovereign right to deal with all pollution problems originating in the boundary waters within its territory.

II. ADJUDICATION OF OHIO'S COMMON LAW INTERESTS IN LAKE ERIE, AS PARENS PATRIAE FOR ITS CITIZENS, COULD INVOLVE THIS COURT IN LITIGATION INITIATED BY THE STATES OF NEW YORK, PENNSYLVANIA AND MICHIGAN, AS WELL AS THE PROVINCE OF ONTARIO AGAINST INNUMERABLE DEFENDANTS, AS WELL AS RAISING DIPLOMATIC ISSUES HERETOFORE RESOLVED BY THE 1909 TREATY AND THE INTERNATIONAL JOINT COMMISSION.

Consideration necessarily must be given to the interests and laws of the States of New York, Pennsylvania, Michigan and the Province of Ontario, as well as the interests and laws of Ohio when claims of the pollution of Lake Erie are sought to be adjudicated, to say nothing of the sovereign interests of Canada and the United States.

The fact that Ohio seeks to name only Dow Canada, Dow United States and Wyandotte as defendants raises a serious question as to whether any meaningful adjudication of any of the problems of the pollution of Lake Erie can be had if this Court, exercising its discretion, decides to entertain Ohio's Complaint.

If Ohio is given leave to file its Complaint, then, should not the States of New York, Pennsylvania and Michigan, as well as all of the municipalities and industrial plants bordering the shores of Lake Erie known to have discharged mercury or compounds thereof into the boundary waters of Lake Erie be joined as parties?

Then, too, before environmental and water pollution problems can be eradicated or protected against, definite quality standards and guidelines should be established to achieve the quality level desired.

It is submitted the goals settled upon can only be reached by scientific expertise, inspection, investigation, surveillance, protection, curtailment and enforcement extending over a long period.

In 1943, this Court was involved in a highly technical and abrasive dispute involving Colorado and Kansas and their respective rights to the beneficial use of the Arkansas River. After considering the problems involved, this Court held in *Colorado v. Kansas*, 320 U.S. 383 (1943) as follows:

"In controversies involving the relative rights of States, the burden on the complaining State is much heavier than that generally required to be borne by private parties, and *this Court will intervene only where a case is fully and clearly proven.* (Headnote).

"Kansas' allegations that Colorado's use has materially increased since the decision in *Kansas v. Colorado*, and that the increase has worked a serious detriment to the substantial interests of Kansas, are not sustained by the evidence. (Headnote).

"Relief other than the restraint of further prosecution of suits by the Kansas user against Colorado users is denied to both States. (Headnote).

"*The reason for judicial caution in adjudicating the relative rights of States in such cases is that, while we have jurisdiction of such disputes, they involve the interests of quasi-sovereigns, present complicated and delicate questions, and, due to the possibility of future change of conditions, necessitate expert administration rather than judicial imposition of a hard and fast rule. Such controversies may appropriately be composed by negotiation and agreement, pursuant to the compact clause of the federal*

Constitution. We say of this case, as the court has said of interstate differences of like nature, that such mutual accommodation and agreement should, if possible, be the medium of settlement, instead of our adjudicatory power. (p. 392) See *Washington v. Oregon*, 214 U.S. 205, 218; *Minnesota v. Wisconsin*, 252 U.S. 273, 283; *New York v. New Jersey*, 256 U.S. 296, 313. Compare the Colorado River Compact of Nov. 24, 1922, authorized by Act of August 19, 1921, 42 Stat. 171, and dismissed in *Arizona v. California*, 292 U.S. 341, 345; and compare *Hinderlider v. La Plata River Co.*, 304 U.S. 92. (Footnote p. 392)

"In such disputes as this, the court is conscious of the great and serious caution with which it is necessary to approach the inquiry whether a case is proved. Not every matter which would warrant resort to equity by one citizen against another would justify our interference with the action of a State, for the burden on the complaining State is much greater than that generally required to be borne by private parties. Before the court will intervene the case must be of serious magnitude and fully and clearly proved. And in determining whether one State is using, or threatening to use, more than its equitable share of the benefits of a stream, all the factors which create equities in favor of one State or the other must be weighed as of the date when the controversy is mooted. (pp. 393-4) *Missouri v. Illinois*, 200 U.S. 496, 520-521; *New York v. New Jersey*, 256 U.S. 296, 309; *North Dakota v. Minnesota*, 263 U.S. 365, 374; *Connecticut v. Massachusetts*, 282 U.S. 660, 669; *Alabama v. Arizona*, 291 U.S. 286, 292; *Washington v. Oregon*, 297 U.S. 517, 522." (Footnote p. 393)

In considering the situations prognosticated above, questions immediately arise as to the "right" of Ohio, as *parens patriae*, to assert its common law seeking an injunction or damages because of the alleged negligence of a Canadian corporation occurring in Canada resulting in

a claimed nuisance in Ohio's portion of the international boundary waters.

In a report to a special commission (1966-7) authorized under the *National Science Foundation Act of 1960* (Act of May 10, 1950, ch 171, § 2, 64 Stat. 149, as amended, 42 U.S.C. 1861 to 1875) entitled, *Weather Modification, Law, Controls, Operations, Report to the Special Commission on Weather Modification*, the following significant observation is made:

"One of the glories of the common law in its period of greatest development was the ability of its judges, at least the best of them, to meet the challenge of new factual situations through the application of rules developed in precedents and in related and analogous cases. *One of its greatest defects, if not its chief failing, was its inability to preview new situations and to help adjust men's affairs so that new and preventable conflicts would not arise.*" *Report to Special Commission, 1966-7, above, p. 1. (Emphasis supplied.)*

III. OHIO'S CLAIM FOR DAMAGES AS PROPRIETOR IS NOT FOUNDED UPON LEGAL PRINCIPLES WHICH WILL PERMIT THE RECOVERY OF DAMAGES.

Despite more than a century of adjudication of disputes involving individual states, there has never been a case within this Court's original jurisdiction in which damages have been awarded to a state in its *parens patriae* capacity. The reason for this fact is clear. Damages may be suffered by individuals, but a state may sue as *parens patriae* only on behalf of its citizenry as a whole, and not in the interests of particular groups of its citizens, as the Solicitor General admits at Page 8 of the United States Brief. See *Georgia vs. Tennessee Copper Co.*, 206 U.S. 230, 239 (1907); *Pennsylvania vs. West Virginia*, 262 U.S. 553 (1923).

The impropriety of damage awards in a *parens patriae* case is exemplified by the Ninth Circuit's decision that Hawaii may not maintain a *parens patriae* antitrust action for injury to the economy of the state, even though the damages claimed were asserted to have independent existence apart from injuries to citizens or classes of citizens of Hawaii. 1970 Trade Cases 73 at page 340 (September 25, 1970). On this point, the Court stated:

"* * * The general economy is an abstraction. It has no value in itself, save as it may (in a representational capacity on behalf of business and property generally) serve to confer value on the specific items of business or property it affects. It exists only as a reflection of the business or property values it represents."

The Ninth Circuit's decision recognizes damages for injury to a State's general economy may be impossible to assess separate and apart from damages suffered by the State's citizens; and that to allow both to maintain an action would make possible double recovery for the same harm. As Professor Freund has pointed out with respect to *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945):

"Whatever strategic end may have been achieved through the earlier overruling of a motion to dismiss (324 U.S. 439), the complete inability of the state to make good its claim of injury as *parens patriae* suggests that in the future the Court may be more wary of sweeping allegations of detriment to a state's economy as a basis of a case or controversy." Freund, *Book Review*, 3 J. LEGAL ED. 643, 644 n. 2 (1951).

It is well settled that, while a state may regulate and protect fish and wildlife in waters within its boundaries, such power is an incident of its police powers. *Anthony v. Veatch*, 220 P.2d 493, 504, 509 (Sup. Ct. Ore. 1950). "Fish and game are owned by the states, not as proprie-

tors, but in their sovereign capacity as the representatives and for the benefit of all their people in common." *Organized Village of Kake v. Egan*, 174 F. Supp. 500 (D. Alaska 1959). (Headnote) (Emphasis supplied). See *United States v. Shauver*, 214 F. 154 (D.C. E.D. Ark. 1914).

In *Missouri v. Holland*, 252 U.S. 416 (1920), the Court said, with respect to wild birds:

"To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership. The whole foundation of the State's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away." 252 U.S. at 434.

The State of Ohio accordingly has no proprietary interest in the water, fish and wildlife of Lake Erie sufficient to sustain any damage claim based on injury thereto.

When this Court decided *North Dakota v. Minnesota*, 263 U.S. 365 (1923), this Court said, in dismissing North Dakota's suit to enjoin the State of Minnesota:

"2. In a suit of that character, the burden upon the plaintiff State of sustaining her allegations is much greater than that imposed upon the plaintiff in an ordinary suit between private parties. (Headnote) See also *New York v. New Jersey*, 256 U.S. 296, 309; *Missouri v. Illinois*, 200 U.S. 496, 521.

"North Dakota, in addition to an injunction, seeks a decree against Minnesota for damages of \$5,000 for itself and of a million dollars for its inhabitants whose farms were injured and whose crops were lost. It is difficult to see how we can grant a decree in favor of North Dakota for the benefit of individuals against the State of Minnesota in view of the Eleventh Amendment to the Constitution, which forbids the extension

of the judicial power of the United States to any suit in law or equity of another State or by citizens and subjects of a foreign State. 263 U.S. at 374-5.

"The right of a State as *parens patriae* to bring suit to protect the general comfort, health, or property rights of its inhabitants threatened by the proposed or continued action of another State, by prayer for injunction, is to be differentiated from its lost power as a sovereign to present and enforce individual claims of its citizens *as their trustee* against a sister State. For this reason the prayer for a money decree for the damage done by the floods of 1915 and 1916 to the farms of individuals in the Bois de Sioux Valley, is denied, for lack of jurisdiction." 263 U.S. at 375-6.

The claims for damages sought by Ohio cannot be determined with anywhere near the degree of certainty required to satisfy settled judicial principles. It will be most difficult to prove whether any mercury discharged from Dow Canada's Sarnia plant actually traveled down the St. Clair River, through Lake St. Clair, down the Detroit River, past the Wyandotte plant (where mercury is also alleged to have been discharged) and finally was deposited in Lake Erie within Ohio's borders. Also, there is no evidence any fish, wildlife or vegetation within Ohio territory were actually exposed to the mercury or compounds thereof discharged from Dow Canada's Sarnia plant, even if such mercury or compounds thereof did reach Ohio's borders. Nor is there any known way of ascertaining whether the same fish, wildlife or vegetation have also been exposed to the mercury or compounds thereof introduced into Lake Erie by the numerous other plants and municipalities located on the shore of Lake Erie; and, if so, how much mercury or compounds thereof such fish, wildlife or vegetation may have absorbed from such sources.

Ralph W. Purdy, Deputy Director of the Michigan Department of Natural Resources, in testifying before the Subcommittee on Energy, Natural Resources and the Environment of the Committee on Commerce of the U. S. Senate, 91st Cong., 2nd Sess., May 8, 1970, reported that tests of sediment samples of Lake St. Clair showed "* * * no significant amounts of mercury in the sediments of the Michigan portion of Lake St. Clair." (p. 11.)

Ralph W. Purdy further stated:

"In investigating possible sources of mercury, we learned that mercury and mercury compounds are used in numerous and diverse everyday operations such as: in diaper laundries; in marine and acrylic based paints; in the manufacture of acetylene, polyvinylchlorides, chlorine and caustic soda; in seed, lawn and pulpwood fungicides; in hospitals; in mercury seals in trickling, filter sewage treatment plants; in mercury batteries; and in paper making plants."

This is of particular importance when a report entitled *Investigation of Mercury in the St. Clair River-Lake Erie Systems*, prepared by the United States Department of the Interior, Federal Water Pollution Control Administration presented at the June 3, 1970, Conference on Lake Erie in Detroit, Michigan, contained the following information:—"List of Companies known to discharge or to have discharged mercury to Lake Erie or its tributaries: Wyandotte Chemical Co., Wyandotte, Michigan; Detrex Chemical Industries, Ashtabula, Ohio; General Electric Chemical Products Plant, Cleveland, Ohio; Harshaw Chemical Co., Div. of Kewanee Oil Co., Elyria, Ohio; Mallinckrodt Chemical Works, Calsical Division, Erie, Pennsylvania; Nosco Plastics, Erie, Pennsylvania; Allied Chemical Co., Buffalo Dye Div., Buffalo, New York; and National Aeronautics & Space Administration, Lewis Research Center, Cleveland, Ohio."

Further, it is known mercury appears naturally in rocks and sediments prevalent in the Great Lakes region and may become methylated and harmful when covered by water, particularly when municipal sewage has been discharged into the water. Recently, it has been reported mercury has been found in substantial amounts in remote locations where there are no industrial facilities nearby to explain its presence. ENVIRONMENT, Nov. 1970 at S-1.

On December 16, 1970, the *Wall Street Journal* quoting The Food and Drug Administration and "Federal experts," reported:

"Canned tuna sampled from all fishing grounds of the world showed unacceptable amounts of mercury 23% of the cases, * * *

"Federal experts said there wasn't any reason to believe the mercury contamination detected in tuna was peculiar to this year's pack. The reasons for the contamination of the deep sea fish aren't known and are puzzling to scientists.

* * * * *

"Dr. Albert Kolybe, Jr., deputy director of the Bureau of Foods, said it appeared that large, predatory fish with long life spans, such as the tuna, appear to concentrate mercury from the material on which they feed. Yesterday, FDA experts said they had confirmed findings by New York professor, Bruce McDuffie, of excess mercury levels in frozen swordfish. But FDA testing for mercury in shrimps and salmon has shown these smaller fish don't have levels above the 0.5 parts per million guideline."

The same *Wall Street Journal* article also reported:

"FDA experts said that only two instances are known to have occurred in which mercury in fish caused health damage to humans. Both were in Japan and were caused by much higher levels of mercury

in fish and shellfish, ranging from 15 to 40 parts per million."

* * * * *

"FDA Commissioner Edwards said the 0.5 guideline has sufficient safety built into it that consumers needn't worry if they eat some cans of tuna containing excess levels of mercury."

It seems reasonable to conclude that as scientists and researchers become more knowledgeable concerning the exposure of humans to mercury and methyl mercury, tests might well prove most people can consume fish containing levels of methyl mercury or other mercury compounds in excess of 0.5 parts per million of mercury without suffering adverse health effects. This is particularly so since methyl mercury has been present in the boundary waters, rivers, streams and other water sources for at least ten years before scientific investigations revealed its potential toxicity.

In short, because of the current state of scientific knowledge, and the great number of interacting causes and conflicting opinions, there is no accurate or fair way of determining if the average ingestion of methyl mercury "contaminated" fish by humans will proximately result in such humans suffering adverse health effects; nor is there any known way to manage the isolation of the cause or causes, if toxic; or to fairly and accurately assess individual liability for damages, even if damages can be proved.

Ohio's ban on commercial fishing in Lake Erie, ordered by Governor James A. Rhodes on April 12, 1970 was removed on April 22, 1970. The 10 day ban was removed as to all fish, except walleye pike, when laboratory tests showed more than 87% of the fish tested were within federal safety standards.

Clearly, mercury is only a part of the pollution problem of Lake Erie. The many causes of pollution which have interacted, *even prior to discovery of the presence of mercury*, cannot be effectively dealt with independently of each other.

As reported by Reitze, "The various pollutants (in Lake Erie) must also be considered in totality as the synergistic effect of these inputs requires a comprehensive abatement program." Even in 1964, the central basin "was found practically devoid of oxygen below the thermocline" and algae were blamed for "eccological change in the Lake that is destroying commercial fishing." Reitze, *Wastes, Water, and Wishful Thinking: The Battle of Lake Erie*, 20 CASE W. RES. L. REV. 5, 6, 19 (1968).

Thus, a fundamental question is raised as to whether Ohio has presented issues which require such immediate and emergency relief and decision as to justify and warrant this Court exercising its discretion to entertain Ohio's Complaint.

IV. THE BOUNDARY WATERS TREATY OF 1909, THROUGH THE INTERNATIONAL JOINT COMMISSION AND THE JOINT REFERENCES OF APRIL 1, 1946 AND OCTOBER 7, 1964 BY THE GOVERNMENTS OF CANADA AND THE UNITED STATES, PROVIDES AN ALTERNATIVE SUITABLE FORUM WHEREBY THIS COURT, EXERCISING ITS DISCRETION, MAY PROPERLY REFUSE TO ENTERTAIN OHIO'S COMPLAINT.

The thrust of the Brief of the United States in dealing with the Boundary Waters Treaty of 1909 focuses upon the following conclusions:—(1) no provision of the Treaty grants a direct remedy for its violation; (2) its enforcement depends upon further action by the United States and Canada; (3) binding determinations are not authorized within the powers given the International Joint Commission; and, (4) the Treaty is not self-executing.

The conclusions reached by the Solicitor-General appear to be in conflict with opinions and conclusions of other scholars and students concerning the value and importance of the International Joint Commission in mediating the rights, obligations, or interests of the governments of Canada and the United States and the inhabitants of said governments along the common frontier, as defined in the Preamble of the 1909 Treaty.

The International Joint Commission has used its investigative and "judicial," see Bloomfield and Fitzgerald, *Boundary Water Problems of Canada and the United States*, pages 17-37, powers on various occasions to bring about the sought-after mediation between the Canadian and United States governments defined in the Preamble. Confirmation of the effectiveness of the International Joint Commission is demonstrated in reviewing the U. S. Department of the Interior, *Documents on the Use and Control of the Waters of Interstate and International Streams: Compacts, Treaties and Adjudications*, Boundary

Waters Treaty, 1909 (1956) [hereinafter referred to as Documents.] See Documents, Art. IX, at 384 and Documents, Art. IV at 381.

It is argued here the Joint References of April 1, 1946 and October 7, 1964 to the International Joint Commission by the governments of Canada and the United States execute all the provisions and articles of the Treaty of 1909 insofar as the International Joint Commission's inquiries and findings concerning the pollution of Lake Erie on either side of the international boundary are concerned.

Pertinent comments are found in G. Graham Waite's article entitled: *The International Joint Commission—Its Practice and Its Impact on Land Use*, 13 BUFFALO LAW REVIEW, pages 111-112 (1963-4), wherein the following appears:

"Although references may only be made by the national governments, private and public groups may stimulate the governments to act. Writing in reference to a water pollution matter, a former chairman of the United States section, IJC, once stated that to start an IJC investigation 'the first requirement is for interests on one side of the line to call attention' to the undesirable condition. 'If,' the chairman continued, 'the two Governments agree that the problem merits study, they may ask the International Joint Commission to investigate and make recommendations.'

"In the same letter the chairman wrote that, to obtain an IJC investigation, the pollution of boundary waters or waters crossing the boundary must allegedly be 'detrimental to health or property interests.' Here the chairman's language was more conservative than that of the treaty. It is true the pollution forbidden by Article IV is only that which occurs on one side of the boundary 'to the injury of health or property on the other,' but no such

restriction appears in Article IX. Yet the reference ultimately made of the pollution problem interesting the chairman's correspondent stated that the two Governments had agreed upon reference pursuant to Article IX, but 'having in mind the provisions of Article IV * * * that boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other side.' Identical language appears in the 1946 reference of the pollution of boundary waters.

* * * * *

"Perhaps the references used the language only because the situation alleged happened to violate Article IV. If so, there would be no implication that violation of Article IV must be alleged to cause a water pollution reference. It is hard to see any justification for restricting IJC power to investigate water pollution. It is almost equally hard to imagine a water pollution situation referable under Article IX that would not also violate Article IV, assuming a liberal construction of 'property.'"

Professor Robert A. MacKay, Professor of Government and Political Science, Dalhousie University, Halifax, N.S., in his manuscript "*The International Joint Commission Between the United States and Canada*," MacKay, 22 AM. J. INTERNAT. L. 292, wrote as follows:

"IV. ARBITRAL JURISDICTION UNDER ARTICLE X.

By virtue of Article X the Commission is also a permanent court of arbitration between the two countries. The article states:

'Any questions or matters of difference arising between the High Contracting Parties involving the rights, obligations or interests of the United States or of the Dominion of Canada, either in relation to each other or to their respective inhabitants, may be referred for decision to the International Joint Commission by the consent of the two Parties.'

"This article may be open to two interpretations. In the first place, it may be limited by the preamble, which expressly states that the purpose of the treaty is to settle questions then pending or which might thereafter arise 'along the common frontier.' If the preamble governs Article X, it would then be limited to 'frontier' questions. As such, its purpose would be largely to supplement Articles VIII and IX, either in order to constitute a 'last-resort' method when the Commission would be evenly divided over an application under Article VIII, or to settle questions which had already been investigated under Article IX, or probably to decide any controversy arising along the frontier which had escaped settlement under either of those articles.

"On the other hand, if Article X be construed at its face value, there would appear to be no limit as to the geographical location of differences which might be submitted. This view is further supported if we compare Article X with Article IX, which relates to investigations. The phrasology as to the kinds of questions is identical with the striking exception that Article IX includes the qualifying phrase, "along the common frontier between the United States and the Dominion of Canada." This difference is surely not without meaning. Since Article X contains no such exception, nor indeed any express exceptions, it would appear that the framers contemplated the submission of 'any question or matter of difference' whatsoever. 22 AM. J. INTL. L. at 311-312.

* * * * *

"If the Commission should ever be called to function under Article X, it is believed that its members could be relied upon to act as judges rather than as advocates, just as they have acted in all other instances." 22 AM. J. INT'L. L. at 314.

In conclusion, Honorable Matthew E. Welsh, former Chairman, United States Section, International Joint Com-

mission, United States and Canada, in a Panel Discussion on International Cooperation in Curbing Water Pollution—Subject, The International Joint Commission, reported at pages 77-84 in the *Proceedings of the Conference on International and Interstate Regulation of Water Pollution—March 12-13, 1970*, Columbia University School of Law, made the following comments:

"The Legal Advisor's office of the State Department has commented to me that the International Joint Commission (IJC) may well be the most developed organization in existence among the international institutions dealing with problems of international cooperation in curbing transnational pollution." At 77.

* * * * *

"As early as 1912 the governments of the United States and Canada requested the Commission to investigate and report upon the extent, causes, location and remedies for pollution of *all* boundary waters, of which four of the Great Lakes are the major part." At 78.

* * * * *

"It is interesting to note that this IJC report, made more than fifty-one years ago, after commenting that its comprehensive survey had disclosed 'a situation along the frontier which is generally chaotic, everywhere perilous, and in some cases disgraceful,' recommended, * * * it is advisable to confer upon the IJC ample jurisdiction to regulate and prohibit this pollution of waters crossing the boundary." At 78.

* * * * *

"When the Commission is charged with a mission by the Governments, just how does it go about this business of determining the facts? In every case the problem area is, by definition, intersected by an international boundary; and within each country there are numerous overlapping jurisdictions, Federal, Provin-

cial, and State, each of which in turn has an interest. *The energies and talents of all these agencies must be harnessed so that they are all working together toward an agreed solution rather than at cross purposes, since it is not possible to regulate only one side of a river or control pollution of only part of a lake. Unless there is general agreement by all concerned, the mere obtaining of accurate and complete data for an entire river basin, for example, would be very difficult, and the attainment of a solution even more so.*" At 82 (Emphasis supplied.)

* * * * *

"* * * the IJC provides a vehicle which encourages frank and constructive discussion on a continuing basis between the best scientific and technical experts in both countries who have been charged by their governments—Federal, State and Provincial—with administrative responsibility for the particular matter at issue." At 82.

* * * * *

"An additional device or technique has recently been developed by the IJC in discharge of its growing responsibilities in the field of transboundary water pollution, namely, the calling of public international meetings to inquire into the progress being made by administrative agencies responsible." * * * [A meeting was held] "at Windsor, Ontario, concerning [the pollution of] the St. Clair and Detroit Rivers." At 83.

* * * * *

"While the number of new dockets of the Commission is small, the scope and magnitude of each of the more recent tasks referred to it by the two Governments can only be described as enormous. Regulation of the levels of the entire Great Lakes system, *investigation into causes of and means of control of pollution of Lakes Erie and Ontario*, and investigation

of air pollution along the entire boundary are examples. Well over 1,000 engineers, scientists, and specialists and their supporting personnel, all drawn from the public service of both countries, are involved in studies of the Great Lakes under supervision of the IJC on these three references alone." At 84. (Emphasis supplied.)

* * * * *

"Thus, the Governments are increasingly making use of the IJC to investigate and make recommendations concerning problems of mutual concern along the boundary and entrusting it with the responsibility of supervising efforts at solution." At 84.

CONCLUSION.

For all of the reasons stated above, it is submitted Ohio's case is not an appropriate one for the exercise of this Court's original jurisdiction. Leave to file Ohio's Complaint should, therefore, be denied.

Respectfully submitted,

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APPENDIX 1.**Excerpt from Report of The International Joint Commission United States and Canada On The Pollution Of Boundary Waters.**

The Secretary of State for the Government of the United States and the Secretary of State for External Affairs for the Government of Canada on April 1, 1946, made the following Reference to the International Joint Commission through identical letters addressed to the United States and Canadian sections of the Commission.

"I have the honor to advise you that the Governments of the United States and Canada have been informed that the waters of the St. Clair River, Lake St. Clair and the Detroit River are being polluted by sewage and industrial wastes emptied into those waters. Having in mind the provisions of Article IV of the Boundary Waters Treaty signed January 11, 1909, that boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other side, the two Governments have agreed upon a joint Reference on the matter to the International Joint Commission, pursuant to the provisions of Article IX of said Treaty. The Commission is requested to inquire into and report to the two Governments upon the following questions:

- (1) Are the waters referred to in the preceding paragraph, or any of them, actually being polluted on either side of the boundary to the injury of health or property on the other side of the boundary?
- (2) If the foregoing question is answered in the affirmative, to what extent, by what causes, and in what localities is such pollution taking place?
- (3) If the Commission should find that pollution of the character just referred to is taking place, what measures for remedying the situation would, in its judgment, be most practicable from the economic, sanitary and other points of view?

- (4) If the Commission should find that the construction or maintenance of remedial or preventive works is necessary to render the waters sanitary and suitable for domestic and other uses, it should indicate the nature, location and extent of such works, and the probable cost thereof, and by whom and in what proportions such cost should be borne.

For the purpose of assisting the Commission in making the investigation and recommendations provided for in this Reference, the two Governments will, upon request, make available to the Commission the services of engineers and other specially qualified personnel of their governmental agencies, and such information and technical data as may have been acquired by such agencies or as may be acquired by them during the course of the investigation.

The Commission should submit its report and recommendations to the two Governments as soon as practicable."

APPENDIX 2.**Text of Letter Containing a Reference Calling for a Report
on Pollution in Lake Erie, Lake Ontario and the
International Section of the St. Lawrence River.**

October 7, 1964

The International Joint Commission,
United States and Canada,
Washington, D.C., U.S.A.,
and Ottawa, Ontario, Canada.

Sirs:

I have the honor to inform you that the Governments of the United States and Canada have been informed that the waters of Lake Erie, Lake Ontario and the international section of the St. Lawrence River are being polluted by sewage and industrial waste discharged into these waters. Having in mind the provision of Article IV of the Boundary Waters Treaty signed January 11, 1909, that boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other side, the two Governments have agreed upon a joint Reference of the matter to the International Joint Commission, pursuant to the provisions of Article IX of said Treaty. The Commission is requested to inquire into and to report to the two Governments upon the following questions:

- (1) Are the waters of Lake Erie, Lake Ontario, and the international section of the St. Lawrence River being polluted on either side of the boundary to an extent which is causing or is likely to cause injury to health or property on the other side of the boundary?
- (2) If the foregoing question is answered in the affirmative, to what extent, by what causes, and in what localities is such pollution taking place?

- (3) If the Commission should find that pollution of the character just referred to is taking place, what remedial measures would, in its judgment, be most practicable from the economic, sanitary and other points of view and what would be the probable cost thereof?

In the conduct of its investigation and otherwise in the performance of its duties under this Reference, the Commission may utilize the services of engineers and other specially qualified personnel of the technical agencies of the United States and Canada and will so far as possible make use of information and technical data heretofore acquired or which may become available during the course of the investigation.

The two Governments are also agreed on the desirability of extending this Reference to other boundary waters of the Great Lakes Basin at an appropriate time. The Commission is requested to advise the Governments when, in its opinion, such action is desirable.

The Commission should submit its report and recommendations to the two Governments as soon as practicable.

Very truly yours,

For the Secretary of State:

/s/ WILLIAM R. TYLER,
Assistant Secretary.

FILE COPY

Supreme Court, U.S.

FILED

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E. ROBERT SEAVY, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 41 (Original)

STATE OF OHIO, EX REL., PAUL W. BROWN, Attorney
General of Ohio, State House Annex, Columbus, Ohio 43215,
Plaintiff,

vs.

WYANDOTTE CHEMICALS CORPORATION, a corporation
existing under the laws of Michigan, located at 1609 Biddle
Avenue, Wyandotte, Michigan,

DOW CHEMICAL COMPANY OF CANADA, LIMITED, a
corporation existing under the laws of the Dominion of Canada,
located at Sarnia, Ontario,

and

THE DOW CHEMICAL COMPANY, a corporation existing under
the laws of Delaware, located at Midland, Michigan,

Defendants.

**REPLY BRIEF OF WYANDOTTE CHEMICALS
CORPORATION TO THE BRIEF OF THE
UNITED STATES AS AMICUS CURIAE.**

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**REPLY BRIEF OF WYANDOTTE CHEMICALS
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ARGUMENT.

This brief is filed by Wyandotte Chemicals Corporation
in reply to the brief filed herein by the Solicitor General of
the United States for the following reasons:

- (1) The brief of the Solicitor General, insofar as it

relates to arguments presented to this Court by Wyandotte, is founded upon a fundamental misstatement of the position adopted by Wyandotte. The Solicitor General states that it is the position of this defendant that the Federal Water Pollution Control Act provides "the exclusive" remedy for the State of Ohio. (Page 19 of amicus brief)

Wyandotte does not dispute that this Court has the *power* to assume jurisdiction of this case as to Wyandotte. Wyandotte does submit that the *exercise* of this power which lies in the discretion of this Court¹ would defeat the purposes of and conflict with declared national and international policy and procedures.

(2) That, notwithstanding the assertion of the Solicitor General, that the brief filed by him would not deal with "prudential" questions, the brief contains significant value judgments of the Solicitor General upon which are founded a substantial part of the argument presented. These value judgments are incorrect.

The exercise of the Court's discretion should take account of all salient factors. The Solicitor General does not consider the range of available alternatives.

The emergency situation claimed by Ohio and assumed by the Attorney General does not exist. Emergency action by this Court is neither feasible nor desirable.

Finally, the Solicitor General erroneously concludes that the filing of a complaint in this Court is consistent with "primary state responsibility."

1. Amicus brief, Page 2, where the Solicitor General defines (but does not answer) one of the questions as follows:

"5. Assuming there is no legal bar to filing of an original complaint in this Court whether leave to file should be denied by this Court in its *discretion*." (Emphasis supplied)

I.

THIS COURT HAS THE POWER TO ENTERTAIN THE COMPLAINT. WHETHER IT SHOULD EXERCISE THAT POWER IS A "PRUDENTIAL QUESTION."

Wyandotte agrees that this Court, in the exercise of its discretion, has the power to grant Ohio's motion and assume jurisdiction of this case. Wyandotte submits that a prudent exercise of this discretion, in view of the expressed international and national policy relating to water pollution problems, and in light of the existence of international, national and state agencies specially constituted to deal with such problems, would lead to a denial of Ohio's motion.

The Solicitor General states that the defendants insist that the Federal Water Pollution Control Act provides the "exclusive remedy" for the situation alleged in Ohio's complaint.

The brief filed on behalf of Wyandotte makes clear that the Solicitor General's statement is decidedly inaccurate. Wyandotte does not state that Ohio is "precluded" from bringing an action. Wyandotte has recognized that this Court has the power to assume jurisdiction. (Brief of Wyandotte, Page 2)

The Solicitor General does recognize that the exercise of such power lies within the Court's discretion.

It is the position of Wyandotte that a prudent exercise of this Court's discretion should, recognizing international, national and state policy relating to complex problems of this nature, as well as the existence of specialized agencies constituted to deal with such problems, lead to a denial of Ohio's motion in the context of all the circumstances here present.

II.

**BASED ON "PRUDENTIAL" FACTORS, LEAVE TO FILE
THE COMPLAINT SHOULD BE DENIED.**

(A) The exercise of the Court's discretion should take account of all salient factors. The Solicitor General does not consider the range of available alternatives.

It being agreed that the Court has the power to permit the filing of the complaint, in its discretion, the area of inquiry becomes broader than a mere ritualistic examination of such a question as the traditional equity test of whether there exists "an adequate remedy at law." The Solicitor General does not consider the range of available alternatives.

The Federal Water Pollution Control Act provides a comprehensive scheme established by Congress to deal with all aspects of water pollution in the United States; pursuant to this Act, the Lake Erie Enforcement Conference was convened in April of 1970, to deal with the problem of mercury in Lake Erie; Ohio and Michigan are participating in the conference; the States of Ohio and Michigan have established pollution control boards; the system of control thus sponsored by the Act has already resulted in the Ohio Water Pollution Control Board's ordering Detrex Chemical Company of Ohio to cease and desist from the discharge of mercury into Lake Erie, and the Michigan Water Resources Commission's approving a recycling system by which waste waters from the Wyandotte process are treated and recycled into brine wells; a Michigan court has already acted in this matter; the International Joint Commission has dealt with international water pollution in Lake St. Clair, the Detroit River and Lake Erie on other occasions.

Additionally, the Attorney General of the United States has commenced action against ten chemical companies in-

volved in operation of mercury cell chlorine caustic soda plants for the purpose of obtaining an injunction based on the Rivers and Harbors Act of 1899, 33 U. S. C. § 401 seq., and consent decrees relating to mercury discharges have been entered.

The entire subject of mercury discharge continues to be monitored by the Federal Water Quality Administration, which has reviewed operation of Wyandotte's three mercury cell chlorine caustic soda plants. The Corp of Engineers of the Department of the Army apparently intends to require further surveillance by way of requiring a permit under the Rivers and Harbors Act of 1899, and on December 23, 1970, the President issued an Executive Order requiring such permit, indicating an intention by the Executive to act through specialized agencies in dealing with problems of this nature.

The Solicitor General erroneously concluded that Wyandotte was placing sole reliance on the Federal Water Pollution Control Act, and ignored the other agencies which have already taken action with reference to the problem alleged in Ohio's complaint.

In addition, despite the Solicitor General's unwillingness to discuss "the prudential questions" the amicus concludes with a value judgment that the remedy provided by Section 10 of the Federal Water Pollution Control Act is deficient in several respects.

The evaluation by the Solicitor General of the administrative remedies ignores not only the action heretofore taken by the state agencies but the results already achieved by these agencies with reference to the problem alleged in Ohio's complaint.

This value judgment also ignores the purposes of this Act, and the state statutes, one of which was to respond to this Court's plea in *New York v. New Jersey*, 256 U. S. 296,

that a problem of this type is: "more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of representatives of the states so vitally interested in it than by proceedings in any court, however constituted." (Page 313)

(B) The emergency situation claimed by Ohio and assumed by the Solicitor General does not exist. Emergency action by this Court is neither feasible nor desirable.

The Solicitor General in his brief has not addressed himself to the reasons advanced by defendants (which he deems "prudential" arguments) as to why this Court should exercise its discretion by denying Ohio's motion.

However, the reality behind the claim of "emergency" by Ohio merits consideration by the Court. No emergency situation requiring the action of this Court exists. Wyandotte Chemicals had ceased the discharge of metallic mercury from its plant before the filing of the motion in this Court by the State of Ohio. Dow Chemical of Canada had ceased the discharge of metallic mercury before Ohio filed its motion. (Dow of Canada brief, Page 7)

The State of Ohio, after a brief period, has permitted the taking and selling of fish for human consumption from Lake Erie and still so permits. No person in North America has sustained mercury poisoning as a result of eating fish. There is no method known to science for reducing the level of methyl mercury in Lake Erie.

The approach taken by the amicus also fails to consider the factual complexities of the problem presented to this Court by Ohio's motion and complaint, which complexities can only be understood in light of the factual background relating to the present status of Lake Erie.

Lake Erie has achieved a certain notoriety in recent years as a "dead lake." Industrial, municipal and agri-

cultural pollution of Lake Erie has resulted in a disappearance of oxygen from the bottom waters of the central basin. Warm water temperatures and high nutrient levels have aggravated this oxygen depletion. Many pesticides, heavy metals, as well as acids and exotic inorganic and organic chemicals have been discharged into Lake Erie. The allegations in the complaint of Ohio relate only to the presence of methyl mercury in Lake Erie. This substance (which is an organic substance) was first found in the spring of 1970. Investigations have been unable to demonstrate as to whether conditions capable of converting metallic mercury into methyl mercury are present in water or sediment of Lake Erie.

There are numerous sources of mercury contamination adjacent to Lake Erie. An Ohio corporation (not a party hereto) was ordered to cease and desist the discharge of mercurial compounds on April 13, 1970, by the State of Ohio. A second Ohio corporation was found to be discharging waste containing mercury into the Grand River. A New York corporation in Buffalo was found to be discharging mercury into the Buffalo River which also empties into Lake Erie. Mercury has been found in sewage wastes from various Michigan and Ohio municipalities. (App. to brief of Wyandotte, Pages 23A, 24A)

The entire problem of the presence of methyl mercury in fish is so novel that no final standards have been set by the United States Government with reference to the maximum permissible tolerances, there being many objections to the validity of the current "action limits" enforced by the F. D. A. As yet, no feasible means has been suggested which would enable the removal of mercury compounds from Lake Erie or its tributaries.

The presence of methyl mercury in Lake Erie presents a highly complex problem which is only one aspect of the

entire problem of the pollution of Lake Erie. The resolution of the methyl mercury problem of Lake Erie, alone, may be resolved, if at all, only after long, costly, intensive investigations into hitherto unexplored areas of biochemistry and ecology, by specialists in the various disciplines of science, acting under the guidance of governmental agencies specially constituted to deal with this and similar problems.

Since the Solicitor General has stated that Section 12 of the Water Pollution Control Act, 33 U. S. C., Section 1162, deals with pollution by "hazardous substances", and asserts that this is a category "to which mercury and its compounds belong", one might conclude that the emergency is proved. This is an unfortunate value judgment.

The Act does not declare mercury and its compounds to be hazardous substances nor has any action been taken pursuant to the Act to accomplish such declaration, notwithstanding that the section makes detailed provisions for the making of such determination and its promulgation and the taking of certain enforcement actions.

Even if mercury were a hazardous substance, the problem of Lake Erie is massive and forbidding with the need for emergency action being unproved. Further, this Court may appropriately consider the fact that, even if mercury were the sole factor in the disintegration of Lake Erie, this Court would not have before it the Ohio contributors to the problem.

(C) The Solicitor General has erroneously concluded that the filing of a complaint in this Court is consistent with primary state responsibility.

The Solicitor General has also misapprehended the primacy of state action as contemplated by Congress. The state action contemplated in recent statutory enactments was not the action of a state seeking to invoke the jurisdiction of the Supreme Court of the United States. The state action contemplated was the action of state administrative agencies, staffed by professionals, to explore such complex problems and achieve solutions.

As stated in the amicus brief, an important issue in this matter is the allocation of responsibility between Federal and state governments in solving environmental problems which transcend state or national boundaries.

A corollary of this issue, and the critical issue before the Court at this juncture, is the allocation of responsibility between the judicial system and administrative agencies specially created and funded by Congress and the states and staffed with technically trained people with scientific background in the subject of pollution. The action of the State of Ohio in this case seeks to circumvent these agencies.

That this Court's procedures in an action of this type are unlikely to be speedier than those of a specialized agency is recognized by the amicus as a consideration warranting refusal to entertain the complaint.²

An examination of the pertinent Federal and state legislation relating to pollution demonstrates that Congress and the several states have placed the primary responsibility for state action upon the pollution control agencies of the respective states, in cooperation with the Federal Water Quality Administration.

2. Amicus Brief, Page 24, Note 16.

The language of the Federal Water Pollution Control Act is inconsistent with the Solicitor General's assertion that the filing of this action by the State of Ohio is warranted by the Act.

Section 10 of the Act details procedures to be employed when pollution discharges in one state affect the health or welfare of people in another state, even as claimed in this situation.

Under such circumstances, it is mandatory for the Secretary of Interior to formally notify the water pollution control agency of the state where the discharge originates and promptly call a conference of the water control agencies of the various states involved. The problem is to be investigated and recommendations made. If effective abatement does not occur, the Secretary must recommend to the appropriate state water pollution control agency that it take the necessary remedial steps.

If the problem still persists, a public hearing before the federal agency is mandatory. If the public hearing does not resolve the controversy, the Secretary may request the Attorney General of the United States to take action. This action is only to be taken after the administrative processes have been utilized to the fullest extent. (Contrary to Solicitor General's assertion, this judicial enforcement on behalf of the United States is the *only* discretionary aspect of the enforcement measures set out in Section 10(d) of the Act. 33 U. S. C. 1160 (a)-(k).)

The statutes adopted by the States of Ohio and Michigan also compel the conclusion that the filing of this motion by petitioner is contrary to state legislative policy relating to water pollution. Ohio Revised Codes, Section 6111.01-6111.08, 6111.31-6111.40; Michigan Compiled Laws Annotated, Section 323.1-323.13.

These acts are comprehensive legislative schemes which

vest the primary responsibility for the administration of water pollution control problems of Ohio and Michigan in the respective water pollution control agencies for each state.

The States of Ohio and Michigan are currently participating in hearings of the Lake Erie Enforcement Conference relating to alleged mercury contamination of Lake Erie. This conference was convened pursuant to the provisions of the Federal Water Pollution Control Act in April of 1970, and is a continuation of conferences beginning in 1965 dealing with pollution problems in Lake Erie waters. Pennsylvania and New York are also participating in this conference.

Any determination by this Court which would not take into account the multiple activities of the aforementioned public bodies and authorities would result in an abstract decision on a concrete problem. The solution of the problem is unlikely to come from any body which does not possess expertise in respect to the problem presented.

It is patent that this Court may properly anticipate a flood of similar litigation if it equates state "action" with becoming a party plaintiff in this Court. The plaintiff herein has declared that a purpose of this action is the establishment of a positive role of this Court in dealing with all interstate pollution problems.

CONCLUSION.

The question presented to this Court is not whether this Court *can* assume jurisdiction of this case by permitting the filing of a complaint, but whether the Court *should* do so in the total context of the circumstances here involved. Should this Court determine to permit the filing, it should do so with the full knowledge that it will be but one of numerous bodies active in the resolution of the problem, and that its willingness to assume such a role will inherently undermine and prevent the application of the schemes adopted in the Federal Water Pollution Control Act, and other statutory enactments.

Respectfully submitted,

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UNIT OF DOW CHEMICAL OF CANADA IN REPLY

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INDEX

	Page
Summary of Argument	1
Argument 1—The Claim for a Prohibitory Injunction	4
Argument 2—The Claim for a Mandatory Injunction .	8
Argument 3—The Claim for Compensatory Damages .	19
(A) The Constitutional Issue as to Jurisdiction ..	19
(B) Claims for Damages in <i>Parens Patriae</i> Ac- tions	23
Argument 4—Personal Jurisdiction	26
Conclusion	26

Appendix I	1a
Appendix II	15a
Appendix III	17a
Appendix IV	23a
Appendix V	29a

TABLE OF CITATIONS

CASES:

Dyer v. Simms, 341 U.S. 22, Justice Holmes at 27 (1951)	18
Georgia v. Pennsylvania R.R., 324 U.S. 439, 470 (1945)	18
Georgia v. Tennessee Copper Company, 206 U.S. 230 .	23
Hawaii v. Standard Oil Company of California, 1970 Trade Cases Section 73, 340 (September 25, 1970); 431 F.2d 1282 (9th Cir. 1970)	24, 25
Philadelphia Housing Authority v. American Radiator and Standard Sanitary Corporation, 309 F. Supp. 1057 (E.D. Pa. 1969)	26
United States v. Allied Chemical Corporation, Civil Action No. 70-CU-256 N.D.N.Y. Sept. 15, 1970 ...	6
United States v. Curtis-Wright Export Corp., 299 U.S. 304, 316 (1936)	24

	Page
United States v. Olin Corporation, Civil Action No. 1970-338 W.D.N.Y. Sept. 21, 1970	6
United States v. Oregon State Medical Soc., 343 U.S. 326 (1952)	4
United States v. Uniroyal, Inc., 300 F. Supp. 84, 96 (S.D.N.Y. 1969)	4
 BOOKS, PERIODICAL AND REPORTS :	
"Coal Burning Generators, Mercury Pollution Linked", Detroit Free Press, October 1, 1970	12
Federal Water Quality Administration, "Investigation of Mercury in the St. Clair River-Lake Erie Systems", May 1970	14
Robert Graves Greek Myths, Vol. II, Penguin Edition, p. 118	17
Douglas, "Their Glory Is In Danger", Holiday (May 1968) p. 65	13
Woodbury, "Sewage Gushes On, But Something Is Being Done", Life, (Aug. 23, 1968) p. 46	13
Sax, The Public Trust Doctrine in National Resources Law, 68 Mich. L. Rev. 471 (1970), esp. at pages 478-491	22
11 Stan. 1 Rev. 665, 695 (1959)	18
U.S. Department of Interior, FWPCA, Lake Erie Report: A Plan for Water Pollution Control (Aug. 1968), at 82	10

APPENDICES

APPENDIX I—The Ontario Water Resources Commission Amendment Act 1970	1a
APPENDIX II—Release, dated December 15, 1970, relating to draft effluent regulations made by the Hon. Mr. J. Davis, Minister, Government of Canada, Department of Fisheries and Forestry, pursuant to Fisheries Act, Sec. 33 (12) R.S.C. 1952, Ch. 119, as amended Statutes of Canada 1970	15a
APPENDIX III—Legislature of Ontario Debates, October 8, 1970	17a
APPENDIX IV—Mercury, Omnipresent Poison, Washington Post, Dec. 28, 1970	23a
APPENDIX V—Letter from Federal Water Pollution Control Administration, dated November 30, 1970, with list annexed	29a

IN THE
Supreme Court of the United States

OCTOBER TERM, 1969

No. 41 ORIGINAL

STATE OF OHIO, EX REL., PAUL W. BROWN, Attorney General of
Ohio, State House Annex, Columbus, Ohio 43215, *Plaintiff*,

v.

WYANDOTTE CHEMICALS CORPORATION, a corporation existing under
the laws of Michigan, located at 1609 Biddle Avenue, Wyandotte,
Michigan,

and

DOW CHEMICAL COMPANY OF CANADA, LIMITED, a corporation existing
under the laws of the Dominion of Canada, located at
Sarnia, Ontario, Canada,

and

THE DOW CHEMICAL COMPANY, a corporation existing under the
laws of Delaware, located at Midland, Michigan, *Defendants*.

**BRIEF OF DOW CHEMICAL OF CANADA, LIMITED
IN REPLY**

SUMMARY OF ARGUMENT

1. The Supreme Court of the United States ought not exercise its discretion in assuming original jurisdiction over a claim for prohibitory injunctive relief over a foreign resident where the basis of the alleged nuisance has already been effectively eliminated and there has been responsible, realistic, effective and suf-

ficient steps taken and being taken by the foreign governmental authorities having direct jurisdiction and control over the alleged tortfeasors such as to ensure that the conduct complained of will not be resumed.

2. The Supreme Court of the United States in its discretion ought not to assume original jurisdiction over an action claiming a mandatory injunction where grave doubt exists on the indisputable merits whether any court in the result would make such an order because:

- (a) Such an order is manifestly beyond the practical limitations of the court's facilities both as to administration and supervision.
- (b) Scientific and technological uncertainty exists as to existence of a method of removing the mercury.
- (c) Scientific and technological uncertainty exists as to the sources of the mercury sought to be removed.
- (d) The plaintiff has not taken action against known mercury polluters within its immediate direction and control.
- (e) Lake Erie was severely damaged by a multitude of types and sources of pollution long before mercury was discovered in its waters.
- (f) This defendant is remote from the alleged contamination and uncertainty exists as to any causal relationship while at the same time mercury polluters of Lake Erie who have been identified and with respect to whom no doubt as to causation exists are not parties to the action.

- (g) There exists the 1909 Boundary Waters Treaty which was designed to prevent just this type of multiplicity of legal proceedings and chaos.
- (h) The relief claimed would be futile, if ordered, because the mercury pollution of Lake Erie is demonstrably continuing on a daily basis from sources within the State of Ohio itself and other riparian States.

3 A. The State of Ohio seeks compensatory damages only in its capacity as trustee on behalf of its citizens and such claim is constitutionally beyond the original jurisdiction of the Supreme Court of the United States.

B. There is no precedent to support a *parens patriae* action for compensatory damages nor is there any precedent to support a *parens patriae* action by one of the States of the United States against a foreign sovereign or a party resident outside of the United States and subject to a foreign sovereign.

4. While in no way conceding the correctness of the arguments raised by the Brief of the United States as to personal jurisdiction or service of process, Dow Chemical of Canada, Limited concedes that these issues may be raised in subsequent proceedings if leave to file complaint is granted to the State of Ohio.

Argument Number 1

THE CLAIM FOR A PROHIBITORY INJUNCTION

THE SUPREME COURT OF THE UNITED STATES OUGHT NOT EXERCISE ITS DISCRETION IN ASSUMING ORIGINAL JURISDICTION OVER A CLAIM FOR PROHIBITORY INJUNCTIVE RELIEF AGAINST A FOREIGN RESIDENT WHERE THE BASIS OF THE ALLEGED NUISANCE HAS ALREADY BEEN EFFECTIVELY ELIMINATED AND THERE HAS BEEN RESPONSIBLE, REALISTIC, EFFECTIVE AND SUFFICIENT STEPS TAKEN AND BEING TAKEN BY THE FOREIGN GOVERNMENTAL AUTHORITIES HAVING DIRECT JURISDICTION AND CONTROL OVER THE ALLEGED TORTFEASOR SUCH AS TO ENSURE THAT THE CONDUCT COMPLAINED OF WILL NOT BE RESUMED.

1. The Order issued by the Ontario Water Resources Commission on March 26th, 1970¹ remains in force and will so remain indefinitely. Dow Chemical of Canada, Limited is continuing to comply fully with that Order, to the complete satisfaction and under the regular supervision of the Ontario Water Resources Commission. The measures taken by Dow Chemical of Canada, Limited to prevent any possible escape of metallic mercury from its plant are complete, comprehensive and permanent in nature.²

2. Where, as here, there has been "an overt and visible reversal of policy, carried out by extensive operations which have every appearance of being permanent," an injunction should be denied.³

3. The Ontario Water Resources Commission Amendment Act, 1970, was proclaimed in the Province of Ontario on November 13th, 1970. Under this statute,

¹ Appendix VI of the Brief in Opposition filed by Dow Chemical of Canada, Limited.

² See p. 7, para. 6, Brief in Opposition Dow Chemical of Canada Limited.

³ *U.S. v. Oregon State Medical Soc.*, 343 U.S. 326 (1952); *U.S. v. Uniroyal, Inc.*, 300 F. Supp. 84, 96 (S.D.N.Y. 1969).

finer may be imposed upon any person causing material to enter rivers, lakes or other waters which may impair the quality of the water.⁴

4. By Section 8 of that Act it was declared that:

"the quality of water shall be deemed to be impaired if, notwithstanding that the quality of the water is not or may not become impaired, the material deposited or discharged or caused or permitted to be deposited or discharged or any derivative of such material causes or may cause injury to any person, animal, bird or other living thing as a result of the use or consumption of any plant, fish or other living matter or thing in the water or in the soil in contact with the water."

5. By Section 10 of the same statute there is provision, on first conviction of an offender, for a fine of not more than \$5,000.00; and, on each subsequent conviction, for a fine of not more than \$10,000.00. Each day that an offender contravenes the statute is deemed to be a separate offense.

6. There are technological limitations to the present ability of mankind to totally prevent the escape of mercury into the environment. That such technological limitations exist at the present time has been recognized by the Ontario Water Resources Commission in their official recognition that the effluent of chlor-alkali plants will have a residual mercury content of "less than one pound per day".

7. The technological limitation is also recognized by the U.S. Government's acceptance pro tempore of a minimum acceptable daily standard of a continuing residual escape of mercury into the environment in the

⁴See Appendix I.

two cases under the Refuse Act which have been settled on this point by stipulation.⁵

8. This limitation is recognized in the draft effluent regulations for the chlor-alkali industry regarding mercury under the Fisheries Act, prepared by the Environmental Quality Directorate, Department of Fisheries and Forestry, Government of Canada, dated December 15, 1970.⁶

9. In the release made by the Hon. Mr. J. Davis, Federal Minister of Fisheries, Government of Canada, of December 15, 1970, it is clear that the Government of Canada is proceeding towards the total elimination of mercury in the shortest possible time. It is stated in part:

“Swedish experts suggest that .01 pounds of mercury in liquid effluent per ton of chlorine produced is the best feasible with current technology. The successes of most chlor-alkali plants in Canada suggest that our technology has advanced beyond that of the Swedes. Canadian experience suggests effluent losses less than half those as cited by the Swedes, as being attainable.

Regulation

Our interim regulation will require that by April 1, 1971, all chlor-alkali plants in Canada reduce their liquid effluent losses of mercury to 0.01 pounds per ton of chlorine produced with a further reduction to .005 pounds mercury per ton of chlorine by June 1, 1971. The regulation will come up again for review in January, 1972, at which

⁵ *United States v. Allied Chemical Corporation*, Civil Action No. 70-CU-256 N.D.N.Y. Sept. 15, 1970; and *United States v. Olin Corporation*, Civil Action No. 1970-338 W.D.N.Y. Sept. 21, 1970.

⁶ See Appendix II.

time the next stage in reduction toward the goal as zero should be stipulated.”⁷

10. Applying this standard to Dow Chemical of Canada, Limited, whose plant has a capacity of 410 tons of chlorine per day, the maximum permissible loss under these regulations would be 4.1 pounds per day.

11. On March 23, 1970, an emergency arose when the Canadian Government, on that date, imposed a ban on fishing because of the discovery of mercury in fish. Within 4 days of the onset of this emergency, the content of the effluent from the plant of Dow Chemical of Canada, Limited, complied not only with the requirements of the Canadian Federal Department of Fisheries now about to come into force but thereafter so complied; and since that date it has always been acceptable to the Ontario Water Resources Commission.

12. No basis now exists for anticipating that at any time in the future mercury may escape from the plant of Dow Chemical of Canada, Limited as may impair the quality of the water of either the St. Clair River or Lake Erie. In the result, the basis of the issue of the injunctive relief sought by the State of Ohio has become academic.

13. There is no suggestion seriously and responsibly advanced that the steps already taken by the Ontario Water Resources Commission and the Canadian Federal Department of Fisheries and Forestry and the Government of the United States in the Refuse Act Cases are irresponsible, unrealistic, ineffective or insufficient. Nor is there any real suggestion that there is any order that this Court might reasonably make that would be more responsible, more realistic, more effective, or more sufficient than those steps already taken and being taken.

⁷ Ibid.

Argument Number 2

THE CLAIM FOR A MANDATORY INJUNCTION

THE SUPREME COURT OF THE UNITED STATES IN ITS DISCRETION OUGHT NOT TO ASSUME ORIGINAL JURISDICTION OVER AN ACTION CLAIMING A MANDATORY INJUNCTION WHERE GRAVE DOUBT EXISTS ON THE INDISPUTABLE MERITS WHETHER ANY COURT IN THE RESULT WOULD MAKE SUCH AN ORDER BECAUSE:

- (A) Such an order is manifestly beyond the practical limitations of the Court's facilities both as to administration and supervision.
- (B) Scientific and technological uncertainty exists as to existence of a method of removing the mercury.
- (C) Scientific and technological uncertainty exists as to the sources of the mercury sought to be removed.
- (D) The Plaintiff has not taken action against known mercury polluters within its immediate direction and control.
- (E) Lake Erie was severely damaged by a multitude of types and sources of pollution long before mercury was discovered in its waters.
- (F) This Defendant is remote from the alleged contamination and uncertainty exists as to any causal relationship while at the same time mercury polluters of Lake Erie who have been identified and with respect to whom no doubt as to causation exists are not parties to the action.
- (G) There exists the 1909 Boundary Waters Treaty which was designed to prevent just this type of multiplicity of legal proceedings and chaos.
- (H) The relief claimed would be futile, if ordered, because the mercury pollution of Lake Erie is demonstrably continuing on a daily basis from sources within the State of Ohio itself and other riparian states.

1. This Court is asked to direct the removal of mercury and mercury compounds from Lake Erie, (or require the defendants to pay damages in lieu to be held in a trust fund for that purpose) and supervise

the implementation and progress of removal. Such an order would impose on the Court a tremendous administrative burden entirely beyond its limited facilities.⁸ It would also lead the Court into a wilderness of new technology and scientific uncertainty. The technical and scientific experts themselves are in disagreement as to the best and most efficient means of removing mercury from lakes and rivers or neutralizing the effects of methylation. The Hon. Mr. Brunelle, Minister of Lands and Forests of the Province of Ontario has reported that some experts believe that dredging may help; while at the same time he acknowledges that others just as knowledgeable believe it will do more harm than good.⁹

2. The same difference of opinion exists in the United States. The Deputy Director of the Michigan Department of Natural Resources and Executive Secretary of the Michigan Water Resources Commission testified, as follows, before the Subcommittee on Energy, Natural Resources and the Environment of the U.S. Senate Committee at hearings held in Michigan on May 8, 1970:

"We are evaluating the feasibility of removing contaminated sediments through dredging. It has been estimated that to dredge a strip 150 feet wide, 3 feet deep and 1 mile long of the Detroit River would cost approximately one-half million dollars. The cost of dredging Lake Erie, due to the large area involved, would be enormously expensive. *Dredging, moreover, could conceivably cause significant environmental (sic) damage including pos-*

⁸ See para. 8, p. 45 Brief in Opposition Dow Chemical of Canada, Limited.

⁹ Legislature of Ontario Debates, Oct. 8, 1970, the Hon. Mr. Brunelle, Minister of Lands and Forests, p. 4781—Appendix III.

sible additional releases of mercury compounds to the aquatic environment. No conclusion has been reached as yet on the possibility of any dredging. Efforts are also underway to determine whether there is any possible way to chemically neutralize or bind the mercury in bottom sediments within the affected area. Results to date do not indicate any practical method of chemical treatment of the contaminated bottom sediments." (p. 11, testimony of Ralph Purdy.) (emphasis added)

3. Previously, in 1968, the Federal Water Pollution Control Administration in considering pollution of Lake Erie from sources other than mercury had reported:

"Dredging Lake Erie. A possible step to the immediate improvement of Lake Erie, in addition to the previous recommendations, is the dredging of the lake bottom. This would be the ultimate in refinement of water quality in the lake.

"The cost to dredge the top three feet of sediments would be many billions of dollars and would take many decades to accomplish. Because of the complete absence of knowledge about actual benefits of such an undertaking and the great expense, this is considered impractical. The FWPCA does not believe that it will be necessary to remove bottom sediments in order to restore Lake Erie water quality. Even if such a project were undertaken, the disposition of the dredged material would be a major problem." (emphasis in original)¹⁰

4. Scientific studies now in progress are expected to point the way to realistic and effective solutions in the near future. In Sweden, where problems of absorption of mercury by fish in fresh water lakes were first rec-

¹⁰ U.S. Department of Interior, FWPCA, Lake Erie Report: A Plan for Water Pollution Control (Aug. 1968), at 82.

ognized, experiments are being conducted to test several new methods of rendering methylated mercury harmless or inactive.

5. In recent months, scientists have unanimously concluded that the mercury which is present in the environment comes from many sources, both natural and industrial. Mercury has now been discovered in the waters of lakes which are remote and which are isolated from any possible source of industrial contamination.¹¹ It has also been discovered recently that mercury, in significant amount, was present in fish which were caught about 40 years ago in remote areas of the Adirondaks. The water in these areas were free, at that time, from agricultural and industrial sources of mercury.^{11a}

6. At the International Conference on Environmental Mercury Contamination held at the University of Michigan from September 30th to October 2, 1970, it was disclosed that fossilized fuels emit mercury when burned.

7. Many sources of mercury pollution are located in the City of Detroit which is situated more than 60 miles downstream from the plant in Sarnia of Dow Chemical of Canada, Limited. At the same Conference, a paper was read by Mr. Williams Turney as a representative of the Michigan Water Resources Commission. In particular, Mr. Turney informed the Conference that the plants of Detroit-Edison and Consumers Power, which are adjacent to the Detroit River, constantly

¹¹ Legislature of Ontario Debates, Oct 8, 1970, the Hon. Mr. Brunelle, Minister of Lands & Forests, p. 4781—Appendix III.

^{11a} "Mercury: Omnipresent Poison" Washington Post, December 28, 1970. App. IV.

emit large quantities of mercury. Calculations made by him showed that the amount of coal burned within the State of Michigan, for the purpose of generating electricity, should produce about 20,000 lbs. of mercury annually.¹²

8. In October 1970, Counsel for Dow Chemical of Canada, Limited requested the office in Ohio of the Federal Water Pollution Control Administration of the Department of the Interior of the United States to provide a list of all sources from which mercury is believed to enter the waters of Lake Erie. The reply to this request was a letter dated November 30th, 1970 to which was annexed a list of Companies known to discharge or to have discharged mercury to Lake Erie or its tributaries. Dow Chemical of Canada, Limited did not appear on this list. (This letter and list are reproduced in Appendix V hereto).¹³ One of the sources appearing on this list is an agency of the Government of the United States.

9. Lake Erie was severely damaged by a multitude of types and sources of pollution long before mercury was discovered in its waters. In the issue of *Holiday* magazine for May, 1968, Mr. Justice Douglas wrote:

"Lake Erie, the recreational frontyard of Buffalo, Cleveland, Toledo and Detroit is gone. Though it supplies water for ten million people, even the heart of it has none of the dissolved oxygen necessary for the fish, plants and insects on which lakes thrive. Erie now supports little aquatic life except trash fish, bloodworms, sludgeworms and bloodsuckers. A monstrous cancerlike growth of

¹² "Coal Burning Generators, Mercury Pollution Linked", Detroit Free Press, October 1, 1970.

¹³ See Appendix V.

algae, nourished by phosphates from industrial wastes, possesses this body of water.

Lake Erie is shallow, and some think that at the present rate it will be completely polluted with sludge, algae and other deposits within twenty-five years."¹⁴

In August 1968, *Life* magazine reported:

"At the present rate of weed growth, Lake Erie will become a Sargasso Sea within the lives of our children; already a foot-deep mat of algae covers several hundred miles of Erie."¹⁵

10. On August 23, 1968, *Life* magazine reported, as a caption to a picture:

"Erie's curse is the Cuyahoga, which snakes through Cleveland . . . carrying a load of detergents, sewage and chemicals to the lake. Eyesores abound at river's edge . . . and in the Cleveland port itself, where left-over litter is used to build unsightly breakwaters . . . The big port has only one commercial fisherman . . . and Fred Wital, shown at far right cleaning a meager perch catch, is leaving too."

11. If mercury were the only potential source of harm to the economy or citizens of Ohio, the fact is that the plant of Dow Chemical of Canada, Limited is at Sarnia where Lake Huron empties into the St. Clair River. Sarnia is more than 60 miles from Lake Erie. It is upstream from the Detroit River, which flows into Lake Erie. It is upstream from Lake St.

¹⁴ Douglas, "Their Glory Is In Danger", *Holiday* (May 1968), p. 65.

¹⁵ Woodbury, "Sewage Gushes On, But Something Is Being Done", *Life*, (Aug. 23, 1968), p. 46.

Clair which empties into the Detroit River. It is at the head of the St. Clair River which flows into Lake St. Clair.

12. It is submitted that there is no evidence at all to show that mercury from the plant of Dow Chemical of Canada, Limited ever reached beyond the St. Clair River or, at most, the northern portions of Lake St. Clair. Certainly there is no evidence that mercury from the Sarnia plant ever reached Lake Erie. Indeed the evidence is to the contrary. Sampling of the bottom sediments conducted by Dow Chemical of Canada, Limited indicates that mercury from the Sarnia plant may not have reached even as far as Lake St. Clair, which is downstream of the Sarnia plant.

13. R. W. Purdy, Deputy Director of the Michigan Department of Natural Resources, testified before the Senate Subcommittee on Energy, Natural Resources and the Environment as follows:

"The Federal Water Pollution Control Administration has completed extensive tests of bottom sediment samples from Lake St. Clair, the Detroit River, and Lake Erie. Their results show no significant amounts of mercury in the sediments of the Michigan portion of Lake St. Clair."

14. To the extent that there is mercury in the Detroit River or Lake Erie, there is no reason why it should be assumed to come from the plant of Dow Chemical of Canada, Limited which is located in Ontario on the St. Clair River and near Lake Huron, rather than from recognized sources of mercury located along the Detroit River and Lake Erie. Indeed,

as reported by the Federal Water Quality Administration in May 1970:

"The Detroit River area is the primary source of mercury in the *western* end of Lake Erie. This is revealed by the distribution pattern established through sediment samples . . ." (emphasis added) ¹⁶

15. Even more important perhaps are those other sources of mercury pollution of Lake Erie actually located within the plaintiff State of Ohio to which the State of Ohio chooses to make no reference in its complaint. Injunctive relief is equitable relief and he who would seek equity must do equity. The person seeking equity must come with clean hands. The State of Ohio, in failing to take action against those mercury polluters within its direct control, is in breach of this fundamental equitable doctrine.

16. Under all these circumstances, it would be patently unjust to require merely one potential and relatively remote and unproven source of pollution of Lake Erie to assume financial responsibility for removing all the mercury from the whole lake and its tributaries. Whatever action is taken to this end should involve and be binding upon all of the agencies, corporations, persons and communities responsible for contributing to the problem and all of the states and provinces abutting on the lake.¹⁷

17. If the State of Ohio is permitted to bring this suit, there is no reason why all the other states and

¹⁶ Federal Water Quality Administration, "Investigation of Mercury in the St. Clair River—Lake Erie Systems", May 1970.

¹⁷ See para. 5, pp. 40-41 Brief in Opposition Dow Chemical of Canada, Limited.

all the Canadian provinces on the Great Lakes system should not have a similar right. If the State of Ohio can sue a Canadian citizen in the Supreme Court of the United States for alleged pollution of Lake Erie, the States of Michigan, Pennsylvania, and New York would have the same right to sue Canadians; and the Governments of Canada and of the Province of Ontario would likewise be entitled to sue agencies, corporations, persons and communities resident in the United States of America.

18. Such a multiplicity of suits would create chaos and bring about the very type of situation the 1909 Boundary Water Treaty was designed to prevent.¹⁸

19. But even apart from the Treaty, principles of comity would suggest that the State of Ohio not be permitted to sue a Canadian citizen which has done everything required by both Canadian Federal and Provincial authorities and is making every effort to co-operate and to comply with its own governmental agencies.

Similarly, comity would not be advanced if either or both the Government of Canada or of the Province of Ontario could sue citizens of the State of Ohio or communities within the State of Ohio or the Governmental agencies which are the most serious contributors to the pollution of Lake Erie and all of whom are subject to the jurisdiction of the State of Ohio.

20. Mercury is only one of the many and complex problems affecting the waters of Lake Erie and the fish therein. It is submitted that, having regard to all the foregoing facts a gross injustice would be per-

¹⁸ See pp. 39-44 Brief in Opposition of Dow Chemical of Canada, Limited, esp. para. 4 at p. 42.

petrated if Dow Chemical of Canada, Limited were required to bear the financial burden of attempting to remove all mercury in Lake Erie—and especially when scientists are not in agreement as to the means of removing or neutralizing the mercury.

21. For this Court to make an Order requiring Dow Chemical of Canada, Limited to remove all mercury from Lake Erie would be tantamount to imposing the Herculean labour of cleansing the Augean stables.

22. Any attempt by Dow Chemical of Canada, Limited to remove mercury from Lake Erie would be defeated and rendered futile, and would necessarily extend into perpetuity while substantial quantities of mercury continue to escape into the waters of Lake Erie from many sources, including those already named.¹⁹

23. The magnitude and complexity of the contributing causes and their effects suggest that a truly effective solution must lie in the area of co-operative administrative action by all the governmental entities affected and not through piecemeal judicial action against only a few alleged offenders or benefiting only one of the states or governments involved.²⁰

¹⁹ Sir James Frazer in his commentary on Pausanias (v.10.9) quotes a Norse tale, "The Mastermaid" in which a prince who wishes to win a giant's daughter must first clean three stables. For each pitch-fork of dung which he tosses out, ten return. It is only upon the princess' advice to turn the pitch-fork upside down that his labour is attendant with any success. Frazer suggests that in the original version Hercules may have received the same advice from Athene: Robert Graves suggests that it is more likely that this Norse tale is a variant of this Fifth Labour of Hercules. Robert Graves *Greek Myths*, Vol. II, Penguin Edition, p. 118.

²⁰ See also para. 5, p. 41 Brief in Opposition Dow Chemical of Canada, Limited.

24. The task of unravelling the facts and determining a course of remedial action with respect to one of the most complex ecological problems facing the United States and Canada today is a formidable one. Where alternative methods of resolving the problems exist, which alternative methods, it is submitted, provide greater flexibility and facility of supervision than that attainable through court procedure, it is submitted that it then becomes undesirable for this court to assume original jurisdiction.²¹

25. In an original suit, unlike a case on appellate review, "even when the case is first referred to a master, [the] . . . Court has the duty of making an independent examination of the evidence, a time-consuming process . . ."²² Such cases "consume a disproportionate amount of the Court's time."²³

²¹ For legal authorities please refer to those already cited p. 40 and p. 45 Brief in Opposition of Dow Chemical of Canada Limited; *Dyer v. Simms*, 341 U.S. 22, Justice Holmes at 27 (1951).

²² *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 470 (1945).

²³ 11 Stan. 1 Rev. 665, 695 (1959).

Argument Number 3

THE CLAIM FOR COMPENSATORY DAMAGES

A. The Constitutional Issue as to Jurisdiction

THE STATE OF OHIO SEEKS COMPENSATORY DAMAGES ONLY IN ITS CAPACITY AS TRUSTEE ON BEHALF OF ITS CITIZENS AND SUCH CLAIM IS CONSTITUTIONALLY BEYOND THE ORIGINAL JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

1. The claim for compensatory damages must be distinguished from the claim for damages in lieu of a mandatory injunction. They are separate and distinct types of relief. A right to one may exist in the absence of any right to the other.

2. The Solicitor-General seeks to explain the claim for compensatory damages as a "reclamation trust fund" claim. This is to characterize it as damages in lieu of the mandatory injunction.²⁴ That this is a misapprehension on the part of the Solicitor-General is clear from the prayer from the complaint of the State of Ohio itself:

"WHEREFORE, Plaintiff prays:

1. That *a decree* be entered adjudging that the conduct of Defendants in introducing poisonous mercury or compounds thereof into Lake Erie or tributaries thereto *constitutes a public nuisance and that such nuisance be abated.*

2. That *a decree* be entered perpetually *enjoining* the Defendants and each of them *from introducing poisonous mercury* or compounds thereof into Lake Erie or any tributary thereto.

3. That *a decree* be entered requiring the Defendants and each of them *to remove* from Lake Erie and tributaries thereto the poisonous mercury and

²⁴ Pp. 11 and 12, Brief of United States as Amicus Curiae.

compounds thereof or, *in the alternative*, requiring Defendants to pay to Plaintiff as *damages* an amount not yet determined but to be determined in this cause *sufficient to enable Plaintiff to remove said mercury and compounds thereof from Lake Erie* and any tributaries thereto, said sum to be held in trust for and expended only for this purpose by Plaintiff; such decree to contain appropriate provisions for reporting to the Court on progress of removal so that appropriate enforcement of said decree can be implemented.

4. That *a decree* be entered adjudging that the Plaintiff recover from the Defendants *damages* in an amount not yet determined but to be determined in that cause *compensating for the existing and future damages to Lake Erie*, the fish and other wildlife, the vegetation and the citizens and inhabitants of Ohio." (emphasis added)

3. While there exists some precedent to support a *parens patriae* claim for injunctive relief, there exists no precedent for a *parens patriae* action for pure compensatory damages. The attempt to characterize the claim as a "reclamation trust fund" misconceives the true character of the claim asserted by the State of Ohio. It is simply an attempt to provide a foundation for such a claim *parens patriae*.

4. Inasmuch as there already is a claim *parens patriae* for a mandatory injunction and a further claim for damages in lieu thereof, this characterization as suggested by the Solicitor-General implies a redundancy in the claim of the State of Ohio.

5. If one were to presume against such redundancy, one is left with a pure damages claim. Such a claim is not an alternative to the damages in lieu of a mandatory injunction but in addition thereto.

6. Insofar as the proposed action of the State of Ohio is a common law nuisance action merely for damages alone, Dow Chemical of Canada, Limited does *not* dispute the right of the State of Ohio to commence, in the *proper forum*, an action for compensatory damages on behalf of its citizens for injuries allegedly done to their beneficially held property or interference with their rights of user.

7. Dow Chemical of Canada, Limited *does* dispute however that this Court has *original jurisdiction* to entertain such an action because in such an action for compensatory damages the State of Ohio would not be a party plaintiff in its own behalf, as is required by Article 3, Section 2 of the Constitution as construed by this Court.²⁵ Instead it would be bringing the action for the benefit of other persons.

8. The issue is, therefore, one concerning the nature of the rights which the State of Ohio may properly assert in the proposed action.

9. It is submitted that the State of Ohio does not beneficially possess any property or usufructuary rights in the subject matter alleged to have been injured by Dow Chemical of Canada, Limited.

10. The only proprietary rights of anyone alleged to have been adversely affected so as to give rise to an action at common law for nuisance are proprietary rights to the waters, soil and contents of Lake Erie.²⁶

²⁵ For legal authorities please refer to those already cited pp. 30, 31 and 32 Brief in Opposition of Dow Chemical of Canada, Limited.

²⁶ Presumably "contents" is exclusive of "water" as used in the wording of the section, and therefore must be construed as vesting rights to the fish insofar as the same are capable of being owned by anyone.

11. In this instance the State of Ohio, by declaration in its revised Code 123-03 has declared that it holds the waters, soil and contents of Lake Erie as "proprietor in trust".

12. A legal entity may hold property either as a trustee or as a beneficial owner. No other form of vesting of property is known to the law.

13. A "proprietor in trust", it is submitted, is one in whom property is vested as a trustee rather than as beneficial owner.

14. Because Revised Code 123-03 is legislation of the State of Ohio itself, it is submitted that it is not open to the State of Ohio to adopt in this action a position inconsistent with its own declaration. It is precluded from doing so by the principles embodied in the doctrines of estoppel and election.

15. Distinction must be made between rights of user and rights as a proprietor.

16. The public trust doctrine envisages the State as holding in trust for its citizens certain rights to the use of natural resources the legal title to which is vested in the State.²⁷

17. The doctrine is, therefore, similar to the effect sought to be achieved by the State of Ohio's statutory declaration *supra*, but the public trust doctrine is expressed in terms of rights of user as distinct from beneficial rights to the property of which use is to be made. Thus the word "proprietor" is defined by

²⁷ Sax, *The Public Trust Doctrine in National Resource Law*, 68 Mich. L. Rev. 471 (1970), esp. at pages 478-491.

the Shorter Oxford English Dictionary (3rd Edition) in terms of ownership:

“One who holds something as property, one who has the exclusive right or title to the use or disposal of a thing—an owner”.

18. The rights of user of the waters of Lake Erie for fishing, drinking, navigation and swimming are inalienable rights of the citizens of the State and of the State itself. If any interference be created to the exercise of these rights, then a damages claim, as distinct from injunctive relief, could not be asserted by the State of Ohio in an action within the original jurisdiction of this Court, because this would violate the constitutional limitation. This is so inasmuch as the measure of damages is the injury to the citizen and the action is on behalf of the citizen and not on behalf of the state.²⁸

B. Claims for Damages in *Parens Patriae* Actions

THERE IS NO PRECEDENT TO SUPPORT A PARENS PATRIAE ACTION FOR COMPENSATORY DAMAGES NOR IS THERE ANY PRECEDENT TO SUPPORT A PARENS PATRIAE ACTION BY ONE OF THE STATES OF THE UNITED STATES AGAINST A FOREIGN SOVEREIGN OR A PARTY RESIDENT OUTSIDE OF THE UNITED STATES AND SUBJECT TO A FOREIGN SOVEREIGN.

19. A State possesses the right to bring a *parens patriae* action to enjoin another State or the citizen of another State from interfering with the State's own quasi-sovereign right to the integrity and inviolability of its human and other resources and natural environment.²⁹ It is submitted, however, that there is

²⁸ See *supra* footnote 25 at page 21.

²⁹ *Georgia v. Tennessee Copper Company*, 206 U.S. 230.

no authority which would extend to the State, as distinct from the Government of the United States, a right to bring such an action against a citizen of a foreign country or against the foreign country itself.³⁰

20. Quite apart from the question of the original jurisdiction of this Court, a *parens patriae* action is not available to a State to protect either its own rights of property or the property rights of its citizens. This is so whether these rights are held beneficially or whether they are held by the State in trust for its citizens.³¹

21. It is submitted that damages are inappropriate to a *parens patriae* action. If the measure of damages is to be determined by the damage inflicted upon rights of the citizens of the State, the inevitable result would be a clear probability of exposure of a defendant to payment of double compensation. This result follows from the fact that, regardless of the action taken by the State, the citizens thereof would still retain their independent rights to sue for the damage done to them individually.³²

³⁰ *United States v. Curtis-Wright Export Corp.*, 299 U.S. 304, 316 (1936).

³¹ *Ibid*; See also *State of Hawaii v. Standard Oil Company of California*, 439 F. 2d 1282, 1285 (9th Cir. 1970):

"An injury to the general economy of the state is not an injury to the business or property of the state or its people. Unless the concepts of business or property are expanded well beyond traditional usage, the general economy of a region cannot be regarded as property in possession of the residents individually or publicly."

³² *Hawaii v. Standard Oil Company of California*, 1970 Trade Cases Section 73, 340 (September 25, 1970); 431 F. 2d 1282 (9th Cir. 1970).

22. At p. 32 of the Brief in Opposition of Dow Chemical of Canada, Limited, the statement is made, "There is no precedent in this Court for the recovery of monetary damages in a *parens patriae* suit". The case cited in support of that proposition was *State of Hawaii v. Standard Oil Company of California* (1969) 301 F. Supp. 982 (D. Hawaii 1969).

23. In that case, Pence C. J. had conceded that a State had standing to sue for damages in a *parens patriae* capacity insofar as the acts of the defendant had "a deleterious impact upon the general welfare of economy of the State."³³

24. But even this aspect of the case was overturned on appeal to the 9th Circuit Court of Appeals as reported in 1970 Trade Cases, Section 73, 340 (September 25, 1970) where the Court stated:

"The general economy is an abstraction. It has no value in itself, save as it may (in a representational capacity on behalf of business and property generally) serve to confer value on the specific items of business or property it affects. It exists only as a reflection of the business or property values it represents."³⁴

25. It is submitted that the Court is incapable of assessing compensatory damages to the "general economy" without making an assessment of the damages suffered by the citizens of the State in their individual capacities. To permit both the State and also its citizens to maintain separate actions arising out of

³³ Ibid; at page 987.

³⁴ Subsequently reported in 431 F. 2d 1282 (9th Cir. 1970).

the same tort is to make it inevitable that double recovery be realized against a defendant tortfeasor.³⁵

Argument Number 4

PERSONAL JURISDICTION

1. While in no way conceding the correctness of the arguments raised by the Brief of the United States as to personal jurisdiction or service of process, Dow Chemical of Canada, Limited concedes that these issues may be raised in subsequent proceedings if leave to file complaint is granted to the State of Ohio.

CONCLUSION

It is respectfully submitted that the application by the State of Ohio for leave to file a complaint ought to be denied.

ALL OF WHICH IS
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³⁵ See also *Philadelphia Housing Authority v. American Radiator and Standard Sanitary Corporation*, 309 F. Supp. 1057 (E.D. Pa. 1969).

APPENDIX I

**An Act To Amend the Ontario Water Resources
Commission Act**

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1. Clause *p* of section 1 of *The Ontario Water Resources Commission Act* is amended by adding at the end thereof "and such other matter or substance as is specified by regulations made under clause *ga* of subsection 1 of section 47", so that the clause shall read as follows:

- (*p*) "sewage" includes drainage, storm water, commercial wastes and industrial wastes and such other matter or substance as is specified by regulations made under clause *ga* of subsection 1 of section 47.

2.—(1) Subsection 1 of section 3 of *The Ontario Water Resources Commission Act* is amended by striking out "three" in the fifth line and inserting in lieu thereof "five" and by striking out "seven" in the fifth line and inserting in lieu thereof "eleven", so that the subsection shall read as follows:

- (1) The Ontario Water Resources Commission constituted a corporation without share capital on behalf of Her Majesty in right of Ontario by *The Ontario Water Resources Commission Act, 1956* is continued and shall be composed of not fewer than five and not more than eleven persons as the Lieutenant Governor in Council from time to time determines.

(2) Subsections 2 and 3 of the said section 3 are repealed and the following substituted therefor:

- (2) The Lieutenant Governor in Council shall appoint the members of the Commission and shall designate

nate one member as chairman and one or more members as vice-chairmen.

- (3) In the case of the absence or illness of the chairman or of there being a vacancy in the office of chairman, a vice-chairman designated by the chairman or, failing such designation, a vice-chairman designated by the Commission shall act as and have all the powers of the chairman and, in the event of the absence of the chairman and vice-chairman from any meeting of the Commission, the members present shall appoint an acting chairman, who, for the purposes of the meeting shall act as and have all the powers of the chairman.

3. Section 4 of *The Ontario Water Resources Commission Act* is amended by inserting after "minute" in the first line "of the Commission or of any direction, order, report, approval, notice, permit or licence made or issued by the Commission", so that the section shall read as follows:

4. A copy of any by-law, resolution or minute of the Commission or of any direction, order, report, approval, notice, permit or licence made or issued by the Commission certified by the secretary or assistant secretary under the seal of the Commission to be a true copy shall be received as *prima facie* evidence in any court without further proof.

4.—(1) Subsection 1 of section 8 of *The Ontario Water Resources Commission Act*, as re-enacted by section 1 of *The Ontario Water Resources Commission Amendment Act, 1965*, is repealed and the following substituted therefor:

- (1) Except as provided in subsection 2, three members of the Commission constitute a quorum.
- (2) Clauses *a, b, c, d, e* and *f* of subsection 2 of the said section 8 are repealed.

5. *The Ontario Water Resources Commission Act* is amended by adding thereto the following section:

8a. The Commission may by resolution authorize on such terms and conditions as it considers proper, any officer or officers of the Commission to exercise any of the powers conferred upon the Commission under,

- (a) subsections 2, 2a, 4 and 5 of section 28a;
- (b) subsections 1 and 3 of section 28b;
- (c) subsections 1 and 2 of section 28c;
- (d) subsections 1, 2 and 4 of section 29;
- (e) subsections 1 and 3 of section 30;
- (f) subsections 1 and 3 of section 31;
- (g) subsections 1, 4 and 10 of section 32 and subsections 1 and 3 of section 32a respecting the holding of a hearing and the giving of notice thereof; or
- (h) subsections 1 and 1a of section 43.

6. Subsection 2 of section 10 of *The Ontario Water Resources Commission Act*, as re-enacted by section 1 of *The Ontario Water Resources Commission Amendment Act, 1962-63*, is amended by inserting after "permanent" in the second line "an full-time probationary", so that the subsection shall read as follows:

- (2) *The Public Service Superannuation Act* applies to the permanent and full-time probationary staff of the Commission, except members of the staff who are members of the Ontario Municipal Employees Retirement System, as though the Commission had been designated by the Lieutenant Governor in Council under section 27 of that Act.

7. Section 18 of *The Ontario Water Resources Commission Act*, as amended by section 2 of *The Ontario Water Resources Commission Amendment Act, 1964* and section 1 of *The Ontario Water Resources Commission Amendment Act, 1966*, is further amended by adding thereto the following subsection:

- (4) Every person who hinders or obstructs any employee or agent of the Commission in the exercise of his powers or the performance of his duties under subsection 1 is guilty of an offence and on summary conviction is liable to a fine of not more than \$200 for every day upon which the offence is committed or continues.

8. *The Ontario Water Resources Commission Act* is amended by adding thereto the following section:

- 25a. Under sections 26, 27, 27b and 28 the quality of water shall be deemed to be impaired if, notwithstanding that the quality of the water is not or may not become impaired, the material deposited or discharged or caused or permitted to be deposited or discharged or any derivative of such material causes or may cause injury to any person, animal, bird or other living thing as a result of the use or consumption of any plant, fish or other living matter or thing in the water or in the soil in contact with the water.

9. Subsection 1 of section 26 of *The Ontario Water Resources Commission Act* is repealed and the following substituted therefor:

- (1) For the purposes of this Act, the Commission has the supervision of all surface waters and ground waters in Ontario.

10.—(1) Subsection 1 of section 27 of *The Ontario Water Resources Commission Act*, as re-enacted by section 5 of *The Ontario Water Resources Commission Amendment Act, 1961-62*, is amended by striking out “to a fine of not more than \$1,000 or to imprisonment for a term of not more than one year, or to both” in the tenth, eleventh and twelfth lines and inserting in lieu thereof “on first conviction to a fine of not more than \$5,000 and on each subsequent conviction to a fine of not more than \$10,000 or to imprisonment for a term of not more than one year, or to both such fine and imprisonment”, so that the subsection shall read as follows:

(1) Every municipality or person that discharges or deposits or causes or permits the discharge or deposit of any material of any kind into or in any well, lake, river, pond, spring, stream, reservoir or other water or watercourse or on any shore or bank thereof or into or in any place that may impair the quality of the water of any well, lake, river, pond, spring, stream, reservoir or other water or watercourse is guilty of an offence and on summary conviction is liable on first conviction to a fine of not more than \$5,000 and on each subsequent conviction to a fine of not more than \$10,000 or to imprisonment for a term of not more than one year, or to both such fine and imprisonment.

(2) The said section 27 is amended by adding thereto the following subsections:

(1a) Each day that a municipality or person contravenes subsection 1 constitutes a separate offence.

(1b) Every municipality or person that discharges or deposits or causes or permits the discharge or deposit of any material of any kind, and such discharge or deposit is not in the normal course of

events, or from whose control material of any kind escapes into or in any well, lake, river, pond, spring, stream, reservoir or other water or watercourse or on any shore or bank thereof or into or in any place that may impair the quality of the water of any well, lake, river, pond, spring, stream, reservoir or other water or watercourse, shall forthwith notify the Commission of the discharge, deposit or escape, as the case may be.

- (1c) Every municipality or person that fails to notify the Commission as provided in subsection 1b is guilty of an offence and on summary conviction is liable to a fine of not more than \$5,000.

11. *The Ontario Water Resources Commission Act* is amended by adding thereto the following sections:

27a. —(1) With the approval of the Minister, the Commission may by order prohibit or regulate the discharge or deposit by any municipality or person of any sewage into or in any well, lake, river, pond, spring, stream, reservoir or other water or watercourse, and any such order may, with the approval of the Minister, be amended, varied or revoked by the Commission as it considers desirable.

- (2) Every municipality or person that contravenes an order made under subsection 1 is guilty of an offence and on summary conviction is liable on first conviction to a fine of not more than \$5,000 and on each subsequent conviction to a fine of not more than \$10,000.
- (3) Each day that a municipality or person contravenes an order made under subsection 1 constitutes a separate offence.

27b. —(1) Where, in the opinion of the Commission it is in the public interest to do so, the Commis-

sion may by order require any municipality or industrial or commercial enterprise to have on hand and available at all times such equipment, chemicals and other materials as the order specifies to alleviate the effects of any impairment of the quality of water that may be caused by the municipality or industrial or commercial enterprise.

- (2) Every municipality or industrial or commercial enterprise that contravenes an order of the Commission made under subsection 1 is guilty of an offence and on summary conviction is liable to a fine of not more than \$500 for every day the contravention continues.

27c. Before making an order under section 27a, 27b, subsection 2a of section 28a or section 50, the Commission shall afford a reasonable opportunity to be heard to the municipality or person to whom the order is proposed to be directed.

12. Subsection 2 of section 30 of *The Ontario Water Resources Commission Act* is amended by inserting after "person" in the fifth line and in the eleventh line "or his successor or assignee", so that the subsection shall read as follows:

- (2) Where any person undertakes or proceeds with the establishment of any water works, or the extension of or change in any existing water works, without having first obtained the approval of the Commission, the Commission may order the person or his successor or assignee to afford at his own expense such facilities as the Commission may deem necessary for the investigation of the works and the source of water supply and may direct such changes to be made in the source of water supply and in the works as the Commission may deem necessary, and any changes directed

by the Commission to be made in the works shall be carried out by the person or his successor or assignee at his own expense.

13. Subsection 2 of section 31 of *The Ontario Water Resources Commission Act* is amended by inserting after "person" in the fifth line and in the twelfth line "or his successor or assignee", so that the subsection shall read as follows:

- (2) Where any person undertakes or proceeds with the establishment of any sewage works, or the extension of or any change in any existing sewage works, without having first obtained the approval of the Commission, the Commission may order the person or his successor or assignee to afford at his own expense such facilities as the Commission may deem necessary for the investigation of the works and the location of the discharge of effluent and may direct such changes to be made in the location of the discharge of effluent and in the works as the Commission may deem necessary, and any changes directed by the Commission to be made in the works shall be carried out by the person or his successor or assignee at his own expense.

14.—(1) Subsection 1 of section 32 of *The Ontario Water Resources Commission Act*, as re-enacted by section 5 of *The Ontario Water Resources Commission Amendment Act, 1966*, is amended by striking out "each other municipality concerned" in the seventh line and inserting in lieu thereof "the municipality in or into which the sewage works are being established or extended and to the clerks of such other municipalities", so that the subsection shall read as follows:

- (1) Where any municipality contemplates establishing or extending its sewage works in or into another

municipality or territory without municipal organization, the Commission shall, before giving its approval under section 31, hold a public hearing and give at least ten days notice of the hearing to the clerk of the municipality in or into which the sewage works are being established or extended and to the clerks of such other municipalities and to such other persons and in such manner as the Commission may direct.

(2) Subsection 5 of the said section 32 is amended by striking out "each other municipality concerned" in the thirty-first and thirty-second lines and inserting in lieu thereof "the municipality in or into which the sewage works are being established or extended and to the clerks of such other municipalities", so that the last four lines of the subsection shall read as follows:

and notice of the application shall be given to the clerk of the municipality in or into which the sewage works are being established or extended and to the clerks of such other municipalities and to such other persons and in such manner as the Board may direct.

(3) The said section 32 is amended by adding thereto the following subsections:

(11) Where the Commission has given its approval under section 31 to an extension by a person of his sewage works from one municipality into another municipality or into territory without municipal organization the Board may, on application made by the person undertaking the extension, order the amendment of any by-law passed under paragraph 112 of subsection 1 of section 379 of *The Municipal Act* or any by-law passed under section 30 of *The Planning Act* or any official plan to permit the use of the land for the extension.

- (12) The Board, as a condition of making an order under subsection 11, may impose such restrictions, limitations and conditions respecting the use of land for the extension of the sewage works, not inconsistent with the terms and conditions of the approval of the Commission given under section 31, as to the Board may appear necessary or expedient.

15. Section 32a of *The Ontario Water Resources Commission Act*, as enacted by section 6 of *The Ontario Water Resources Commission Amendment Act, 1966*, is amended by adding thereto the following subsections:

- (4) Where the Commission has given its approval under section 31 to an establishment or extension by a person of sewage treatment works within a municipality the Board may, on application by the person undertaking the establishment or extension, order the amendment of any by-law passed under paragraph 112 of subsection 1 of section 379 of *The Municipal Act* or any by-law passed under section 30 of *The Planning Act* or any official plan to permit the use of land for the establishment or extension.
- (5) The Board, as a condition of making an order under subsection 4, may impose such restrictions, limitations and conditions respecting the use of land for the establishment or extension of the sewage treatment works not inconsistent with the terms and conditions of the approval of the Commission given under section 31, as to the Board may appear necessary or expedient.

16. *The Ontario Water Resources Commission Act* is amended by adding thereto the following section:

- 32b. Subsections 11 and 12 of section 32 and subsections 4 and 5 of section 32a apply *mutatis mutandis* to a

11a

municipality that has obtained the approval of the Commission to the establishment or extension of its sewage works or to the establishment or extension of sewage treatment works.

17. Paragraph 2 of subsection 1 of section 40 of *The Ontario Water Resources Commission Act* is amended by striking out "the rate of $3\frac{1}{4}$ per cent per annum" in the sixth and seventh lines and inserting in lieu thereof "such rate as is prescribed by regulation by the Commission", so that the paragraph shall read as follows:

2. In each calendar year for such period of years as may be prescribed by such agreement, commencing not later than the fifth calendar year next following the date of completion of such project, such sum as would be necessary with interest compounded annually thereon at such rate as is prescribed by regulation by the Commission to form at the expiry of such period of years a fund equal to the cost of such project.

18. *The Ontario Water Resources Commission Act* is amended by adding thereto the following section:

- 41a. Where an agreement is made with a municipality for the provision of sewers under clause *d* of subsection 1 of section 16 or under section 39, the municipality may charge the owner of the premises for which a service drain is constructed the cost of construction of the service drain from the sewer to the line of the highway, together with interest thereon at a rate to be determined by the municipality, over such period of years as the municipality determines.

19. Subsection 5 of section 42 of *The Ontario Water Resources Commission Act* is repealed.

20. Section 43 of *The Ontario Water Resources Commission Act*, as amended by section 12 of *The Ontario Water*

Resources Commission Amendment Act, 1961-62 and section 6 of *The Ontario Water Resources Commission Amendment Act, 1965*, is further amended by adding thereto the following subsection:

- (1a) Notwithstanding subsection 1, where a reserve account has been established in respect of a project, the Commission may, in respect of any other project for the same municipality, expend, use, apply, utilize and appropriate therefrom such amounts as in the opinion of the Commission may be sufficient therefor for any of the purposes mentioned in clauses *a*, *b* and *c* of subsection 1.

21.—(1) Subsection 1 of section 47 of *The Ontario Water Resources Commission Act*, as amended by section 14 of *The Ontario Water Resources Commission Amendment Act, 1961-62*, subsection 1 of section 7 of *The Ontario Water Resources Commission Amendment Act, 1962-63*, subsection 1 of section 10 of *The Ontario Water Resources Commission Amendment Act, 1964* and section 11 of *The Ontario Water Resources Commission Amendment Act, 1966*, is further amended by adding thereto the following clauses:

- (da) prescribing the rate of interest for the purpose of paragraph 2 of subsection 1 of section 40;

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- (fa) classifying persons who operate sewage works and requiring and providing for the licensing of sewage work operators or any class or classes thereof, and prescribing the qualifications of persons to whom licences may be issued, and prescribing and charging fees for such licences, and providing for the revocation and suspension of licences;

.

- (ga) specifying any matter or substance as sewage for the purposes of any section or sections of this Act or of any regulation made thereunder.

(2) Subsection 3 of the said section 47 is repealed and the following substituted therefor:

- (3) Every municipality or person who contravenes any regulation made under this section is guilty of an offence and on summary conviction is liable to a fine of not less than \$25 and not more than \$1,000.

22. Subsection 2 of section 47b of *The Ontario Water Resources Commission Act*, as enacted by section 15 of *The Ontario Water Resources Commission Amendment Act, 1961-62*, is amended by inserting at the commencement thereof "Subject to section 52", so that the subsection shall read as follows:

(2) Subject to section 52, Part XXI of *The Municipal Act* applies *mutatis mutandis* to by-laws passed under this section.

23. Section 51 of *The Ontario Water Resources Commission Act*, as enacted by section 7 of *The Ontario Water Resources Commission Amendment Act, 1960-61*, is amended by adding thereto the following subsection:

- (2) Subsection 1 does not apply in respect of any of such sewage works constructed under an agreement entered into after the 1st day of September, 1964.

24. Section 52 of *The Ontario Water Resources Commission Act*, as enacted by section 11 of *The Ontario Water Resources Commission Amendment Act, 1964*, is amended by inserting after "Act" in the second line "or of any by-law passed under clause c or d of subsection 1 of section 47b", so that the section shall read as follows:

52. Proceedings to enforce any provision of this Act or of any regulation made under this Act or of any by-law passed under clause c or d of subsection 1 of section 47b may be instituted within one year after the time when the subject-matter of the proceedings arose.

25. Section 53 of *The Ontario Water Resources Commission Act*, as enacted by section 11 of *The Ontario Water Resources Commission Amendment Act, 1964*, is amended by inserting after "Commission" in the first line "or an officer to whom power has been delegated by the Commission under section 8a" and by inserting after "Commission" in the second and third lines "or such officer", so that the section shall read as follows:

53. Where the Commission or an officer to whom power has been delegated by the Commission under section 8a has authority to direct or require that any matter or thing be done, the Commission or such officer may direct that, in default of its being done by the municipality or person directed or required to do it, such matter or thing shall be done at the expense of such municipality or person, and the Commission may recover the expense incurred in doing it, with costs, by action in a court of competent jurisdiction as a debt due to the Commission by such municipality or person.

26. *The Ontario Water Resources Commission Act* is amended by adding thereto the following section:

58. Any amount due and payable by a municipality or a person to the Commission under any agreement or otherwise, together with all interest and expenses of debt service, if any, payable by the Commission to the Treasurer of Ontario with respect to such amount may be recovered with costs in a court of competent jurisdiction as a debt due to the Commission by the municipality or person.

27. This Act comes into force on the day it receives Royal Assent.

28. This Act may be cited as *The Ontario Water Resources Commission Amendment Act, 1970*.

APPENDIX II

RESTRICTED

**Draft Effluent Regulations for the Chlor-Alkali Industry
Regarding Mercury Under the Fisheries Act
December 15, 1970**

Environmental Quality Directorate
Department of Fisheries and Forestry
Ottawa, Canada

**EFFLUENT REGULATIONS UNDER THE
FISHERIES ACT**

Regulations are being developed under the authority of Section 33, Subsection 12 of the Fisheries Act as amended on 26 June, 1970.

The Fisheries Act was amended to provide strengthened powers for the Minister to control water pollution as it affects the plant and animal life of waters.

Rationale

The philosophy reflected in these regulations is that the highest practicable degree of treatment should be required consistent with current technology. An overriding condition necessary to provide adequate protection to our aquatic environment will be the total restriction on certain substances.

Regarding an effluent regulation for the chlor-alkali industry the following is proposed, based on several considerations:

Because of gaps in scientific knowledge regarding such things as the sublethal effects of low levels of mercury on the environment and the extent of natural contamination both necessitating further research in these areas, it will only be possible to draft an *interim* regulation.

Further, because of the seriousness of mercury poisoning (Minimata and Swedish experiences), and the widespread observation on this continent of the dramatic biological magnification of mercury in aquatic life forms, our present judgment is that our goal should be the complete elimination of contributions of mercury to the environment by activities of man. This should be achieved in a staged program. The first stage, to be covered by our *interim* regulation should require the highest degree of abatement, in both air and water, practicable with current technology.

Swedish experts suggest that .01 pounds of mercury in liquid effluent per ton of chlorine produced is the best feasible with current technology. The successes of most chlor-alkali plants in Canada suggest that our technology has advanced beyond that of the Swedes. Canadian experience suggests effluent losses less than half those as cited by the Swedes, as being attainable.

Regulation

Our interim regulation will require that by April 1, 1971, all chlor-alkali plants in Canada reduce their liquid effluent losses of mercury to 0.01 pounds per ton of chlorine produced with a further reduction to, .005 pounds mercury per ton of chlorine by June 1, 1971. The regulation will come up again for review in January 1972, at which time the next stage in reduction toward the goal of zero should be stipulated.

APPENDIX III**ONTARIO LEGISLATURE****(October 8, 1970)****STATEMENTS BY THE MINISTRY.****The Hon. Minister of Lands and Forests.**

Hon. R. Brunelle (Minister of Lands and Forests): Mr. Speaker, I have a statement to make with reference to mercury levels in Ontario fish.

Health authorities have recommended since last May that fish with levels of mercury higher than 0.5 parts per million should not be eaten, especially on a regular basis. The Department of Lands and Forests, in co-operation with the Ontario Water Resources Commission and the federal Department of Fisheries and Forestry and their Fisheries Research Board, began collecting fish in Ontario and analysing them for mercury levels almost a year ago.

Today two federal fisheries laboratories in Winnipeg and one in Toronto as well as one provincial laboratory in OWRC, are analysing fish from Ontario supplied by The Department of Lands and Forests or by the federal Fish Inspection Service. Ontario's Departments of Lands and Forests and Agriculture and Food are in the process of establishing analytical facilities for further studies.

Fish of a variety of species from well over 105 distinct water areas amounting to thousands of samples have been analysed. As a result of the earliest testing which was directed toward areas which were suspected to be critical because of industrial activity, a number of waters were officially closed to commercial fishing by regulation, and anglers were issued warnings to "fish for fun." In some areas all commercial fishing was prohibited but in others the prohibition applied only to one or a few critical species.

I am tabling a list of waters, beginning in northwestern Ontario, moving eastward to the Ottawa River, including the Great Lakes, from which fish have been tested to date.

In some cases, samples were taken from commercial shipments of thousands of pounds of fish. In other waters, only individual fish may have been analysed.

This report records for the direction of the public, all areas and species analysed. "Above" means that levels of mercury are 0.5 parts per million or more, which is the recommended upper level for human consumption. "Below" means that the levels are below this limit and are considered acceptable.

Some of the levels discovered are in areas where there are no industrial activities, and further investigation of such waters is necessary to understand the source of these "background" levels. They may be as a result of mercury in the atmosphere or mercury in rock formations.

It is planned to revise this list at two-month intervals or depending on the significance of the change detected as a result of our continuing programme. Commercial fishermen are being warned to move out of areas where levels are above the 0.5 parts per million, or to change their gear to catch species which are not affected. Anglers, through this statement and by means of posted signs, are being warned to "fish for fun".

Further sampling will continue of species not listed; of different age classes of some species; and of waters not yet tested. We suspect that seasonal variations in levels may exist and plan to develop year-round monitoring of some species.

Those areas previously closed to commercial fishing for all fish are marked with an asterisk and those species closed in a few special areas are marked also.

I will have copies of this statement, Mr. Speaker, for all members of the Legislature.

Mr. Speaker: Oral questions.

MERCURY CONTAMINATION OF WATERS

Mr. Nixon: Sir, questions rising from the statement.

Will the minister make clear whether or not new lakes have had fishing banned in them as a result of this announcement?

Hon. Mr. Brunelle: This announcement, Mr. Speaker, is a warning. No new lakes have been closed. However, if, from additional information gained through sampling analysis, we find that it is necessary to close certain lakes, we will do so. At the moment we feel that we have no conclusive results and therefore we are issuing warnings only.

Mr. T. P. Reid (Rainy River): A supplementary, Mr. Speaker: Could the minister indicate—

Mr. Speaker: Order! I must say that we are not entering into the oral question period yet. This was a question of clarification of the minister's statement.

Mr. Nixon: Yes, but we are in the question period.

Mr. Speaker: And it was to be part of the oral question period? Very good.

Mr. T. P. Reid: Can the minister indicate who has the final authority to ban commercial fishing? Is it the provincial government or the federal government or the two governments acting in concert?

Hon. Mr. Brunelle: Mr. Speaker, we work very closely with the federal authorities. I have communicated with the minister. My officials have also communicated with his officials and I would say that the authority rests with ourselves, the Ontario government, to ban commercial fishing.

Mr. Nixon: Mr. Speaker, a further supplementary: The minister has announced previously that efforts will be made to remove the sources of pollution, particularly in the cases of mercury lying in some form or another at the bottom of certain waterways. There is nothing said about that either in this statement or in the minister's comments recently. Can he report on the efforts to remove the polluting mercury? I think he indicated that they were going

to try to dredge the bottom of some of these lakes and that this has been abandoned.

Hon. Mr. Brunelle: On this question, my colleague, the Minister of Energy and Resources Management (Mr. Kerr), is much more knowledgeable, but I would say that there are various types of mercury. There is organic and inorganic; there is metal. At one time—and this is still being considered—thought was given to removing mercury from, for instance, Lake St. Clair, where it is known to be in certain parts of the lake. There are some authorities, who are very knowledgeable and who have the results of what has happened in Sweden and other countries, who feel that this is not advisable. Trying to remove the mercury only aggravates the situation. That is why, at this time, we are considering and trying to base our plans according to experience available in other jurisdictions.

The Minister of Energy and Resources Management has just returned from Sweden and other countries where he consulted with those officials on this very matter.

Mr. Nixon: Are we to understand that no cleanup activities are presently underway?

Hon. Mr. Brunelle: Again, Mr. Speaker, this rests with the Ontario Water Resources Commission and I do not know what they have or have not undertaken. I know they have been in consultation with the industries concerned but I cannot say what they have or have not done.

Mr. Speaker: The hon. member for Thunder Bay.

Mr. J. E. Stokes (Thunder Bay): Thank you, Mr. Speaker. Can the minister assure commercial fishermen who have been adversely affected by the mercury contamination that they will be compensated for any losses by those responsible for the pollution, since the federal Department of Fisheries announced that there will be no assistance through that agency after September 25?

Hon. Mr. Brunelle: What we are doing, Mr. Speaker, is working very closely with the commercial fishermen. We will try and direct those fishermen to those areas where

there is no mercury contamination and to fish for certain species that are not affected. Now that we know from our studies that many, many lakes are suffering—I say suffering—that the fish are contaminated with mercury, not through industrial deposits but through natural backgrounds of the rock formations, or the soil, or the atmosphere.

This throws an entirely different light on the situation, and it may well be—and we do not know, for instance, we need more information—we do not know how long this will last or if this is going to last for a considerable length of time. It may be that in certain areas where it is a natural level of mercury we cannot do anything about this; it may be that we may have to have some retraining programmes. This would be, I would hope, a federal-provincial participation. So at this stage we are still in this exploratory stage, and we certainly do not want to see commercial fishermen deprived of their livelihood without compensation.

Mr. Speaker: The hon. member for Rainy River was going to ask for a supplementary?

The hon. member for Sandwich-Riverside on a supplementary.

Mr. F. A. Burr (Sandwich-Riverside): Yes. Mr. Speaker, a supplementary: The minister mentioned the industrial pollution and the non-industrial pollution or the background pollution. Could the minister tell us whether any of the levels exceed 0.5 parts per million where there is no industrial pollution?

Hon. Mr. Brunelle: Yes. On this list, Mr. Speaker, as I mentioned earlier and there will be a copy for every member—there are many, many lakes in northwestern Ontario, for instance, where there are no known sources of industrial pollution—it must be from background level—but which have rates that are much higher than 0.5 parts per million.

Mr. Speaker: Does the hon. member for Kenora have a supplementary?

Mr. L. Bernier (Kenora): Yes, Mr. Speaker, I have a supplementary to the minister's statement:

In view of the fact that Sweden is presently considering raising its standard from 0.5 parts per million to 1 part per million, and in view of the many lakes that are listed in the minister's statement today, are there discussions going on in this country, or with other authorities, on the possibility of raising that standard?

Hon. Mr. Brunelle: That is a very good question, Mr. Speaker. There are many who question whether 0.5 parts per million is a realistic figure. That is why our counterparts in the United States, in other jurisdictions, and in other provinces in Canada are continually looking further into this, because it could well be that that level may be changed.

From the information that I have been given, health authorities have been in northwestern Ontario and apparently at the moment it does not appear that persons who have been eating fish contaminated with mercury have suffered any ill-effects, though this is being looked into seriously.

APPENDIX IV

(*The Washington Post* Monday, Dec. 28, 1970)

Even Batteries, Fillings Add to Pollution

MERCURY: OMNIPRESENT POISON

By VICTOR COHN

Washington Post Staff Writer

The silvery poison called mercury has long been an accidental part of man's diet. But now, suddenly, it has become a prominent health concern.

Fish with more than .5 parts of mercury per million—the federal safety guideline—have been found this year in most states. Much fishing was banned and fish from suspect areas are now inspected before sale. The levels of mercury found in swordfish and canned tuna brought government action to get contaminated stocks removed from the market.

Where has the mercury come from? Industrial uses of mercury have increased 20-fold since 1945, and many people assume that the increased burden of mercury comes directly from industrial water pollution. But the findings of scientists indicate that the answer is not so simple:

- There is evidence from New York state, not yet officially released, that there was almost as much mercury in some U.S. fish and waters 40 years ago as there is today—though nothing like the peaks caused since by far greater pollution.

- By no means all of today's mercury pollution—probably no more than half—has come from industrial waste discharges into waters, the cause that has had almost all the blame so far.

- Huge amounts, probably tons, are being poured into the atmosphere from the smokestacks of every coal-burning furnace. Electric power generation for Detroit alone may be putting more mercury into the air than were two big

Michigan chemical firms tagged as polluters: Dow and Wyandotte. If all the mercury naturally contained in coal is vaporized on burning, U.S. power plants may be putting as much as 150 tons into the skies every year.

- Many so-called "minor" uses of mercury add up to a huge share of total use, and much of it ends up in the environment. Thus users may toss away transistor radio batteries and dozens of other modern products all unaware that they contain mercury; dental patients may spit out little bits of excess filling in which mercury has been used to dissolve and bind the other materials. (Dental assistants, by recent Canadian figures, have 12 to 45 parts per million in their hair—which concentrates mercury—compared to .2 to .6 parts per million for people in other occupations.)

- Roughly half of all the mercury now being found in food may come from natural sources, and only half from pollution by man.

POTENTIAL DANGER

All mercury is potentially dangerous, in sufficient amounts. These are amounts, it is hoped, several times greater than those now being allowed in swordfish, tuna and other foods.

Doctors know mercury compounds can kill brain and nerve cells, cause liver and kidney damage and—when a pregnant woman consumes it—concentrate in the sensitive fetus.

Still, there has been mercury on the earth for 4.5 billion years, since creation. It is particularly concentrated in certain kinds of rocks, in areas that were once volcanic and where there are deposits of cinnabar (mercury and sulphur ore).

These exist both on the continents and in the oceans. Mercury is also associated with other areas, for example, the manganese nodules on the ocean bottom.

INTAKE INCREASED

Some mercury is being leached or washed out of these sources all the time. Some naturally vaporizes and enters the air. It is highly probable that some is eventually turned into the chemical form—methylmercury—that is most harmful to human beings.

Only in 1934, a German chemist found that his average countryman's mercury intake was 35 micrograms a week—just a trace, mostly, it was assumed, from natural sources.

Today, estimates Dr. David H. Klein, chemistry professor at Hope College in Holland, Mich., an average American's mercury intake would be 300 micrograms a week if he eats no meat, 350 if he eats "a little meat" and 750 if he depends almost entirely on the contaminated fish—fresh or salt water—now banned from commerce.

Serious concern over mercury in the environment started in the '50s and '60s. The Swedes found it in wild fowl, the result of their eating farm seed treated (to kill fungus disease) with methylmercury.

The Japanese counted 50 deaths and nearly 200 more cases as the result of massive discharges by plastics plants of the dangerous methylmercury.

CONVERTED BY BACTERIA

But mercury-using industry generally was discharging not methylmercury but the metallic form, which everyone assumed just sank to stream bottoms. Then scientists learned that bacteria in water or fish could convert metallic mercury to methylmercury.

Earl J. Harris, associate analytical chemist in New York State's Rome Pollution Laboratory—part of its Department of Environmental Conservation—recently examined "in the neighborhood of a dozen" fish, mature walleyed pike and small mouth bass caught in various New York waters from

1927 onward, then preserved in alcohol as biological specimens.

All but two, he discovered, contained more than .5 parts of mercury per million, in amounts up to 1.5 parts. But none contained levels as high as 8 parts, the high so far in fish caught this year in badly affected Lake Onondaga, site of a chlor-alkali plant that was long a Class A mercury polluter.

Some of Harris' fish, reports Dr. Roger Herdman, a New York state toxicologist, came from remote areas in the Adirondacks with no agricultural or industrial mercury sources—and downwind of no major cities.

NATURAL SOURCES

"I can't think of any way that mercury got there except from natural sources," Herdman states. "But there is also absolutely no question but there have been additions to mercury levels from pollution."

Chemists in Michigan, where Lake Erie was badly affected, began analyzing coal samples. One from southeastern Ohio, they found, contained .4 to .5 parts per million of mercury.

Much other coal is rated far lower. But even .1 part per billion adds up—the Western world has burned coal since the Industrial Revolution, and the vapor is blown by winds all over the globe, then rained down on land and seas, to end up in water filtered by plankton which are eaten by fish which, after many such concentrations, are eaten by the largest fish at the top of the food chain—like swordfish and tuna.

In Crude Oil

Kevin Shea, scientific director of the Committee for Environmental Information in St. Louis, reports finding that some crude oil—also burned by electric power plants—con-

tains as much as 20 parts of mercury per million. But the amount in most oil may be far lower, in parts per billion.

"For the real information on where we're mainly using mercury," and how much we may be throwing away sooner or later, "just look at the annual Minerals Yearbook of the Bureau of Mines," says Dr. Frank D'Itri of Michigan State University's Institute of Water Research.

A look shows that the United States "consumed" 6,011,094 pounds of mercury in 1969. The chemical industry (including relatively minor chemical users like paper and pulp mills and drug-makers) used 1,914,060 pounds or 32 per cent.

The industry is probably still using as much, but with far stricter antipollution measures. The Interior Department in September said mercury discharged into waters had been reduced by 86 per cent.

The pharmaceutical industry uses mercury in diuretics (antiwaterlogging drugs) and as a bacteria-killer in salves and antispectics (like mercurochrome, named for its mercury).

"How much of this," asks D'Itri, "do you suppose we wash down the sink?"

A full 24 per cent of the entire mercury output is used to make electrical apparatus. It goes into mercury batteries, energy cells, scientific instruments, flashlight, toys, radios, mercury vapor lights for street lighting and fluorescent, germicidal and photocopying lamps.

"We're obviously throwing away a lot," D'Itri says, "and mercury for a metal is tremendously volatile."

In Control Instruments

Another 9 per cent is used in industrial and control instruments, a separate category. Dentistry uses 4 per cent, 9.7 per cent is used in making paint long-lasting and fungus-

resistant—until it eventually deteriorates to be washed away someplace.

“General laboratory use” accounts for 3 per cent. “A lot is used in hospitals,” D’Itri says. “Pathologists use it as a fixative for tissues. Then the tissues are incinerated—and the mercury goes into the air—or they’re ground up in the ‘Dispose-all,’ and they and any excess solution go down the drain.

“Many of these uses are very minor. But they add up.”

Agricultural uses—mainly seed-treating—took 3 per cent of 1969’s mercury output. Most uses of the most dangerous forms have now been halted, the Agriculture Department reports. It was treated seed, painted red as a warning, which a New Mexico family fed its pigs—to live on the pork until sickness began.

No medical symptoms attributable to mercury have yet been seen in any moderate eaters of tuna or swordfish or other fish-eaters.

“The fact that we can’t identify an actually sick person is a happy one,” says Herdman. “It would be insane to wait until someone is sick before we start to worry about this.”

And St. Louis’ Dr. Neville Grant, specialist in internal medicine, and a teacher at Washington University, worries about “what really cause some of our funny neurological diseases.”

“I think we have to look very closely at many more fetuses,” he says. “I think we have a great deal to learn yet about very low-level mercury poisoning.”

APPENDIX V

UNITED STATES DEPARTMENT OF THE INTERIOR
FEDERAL WATER POLLUTION CONTROL ADMINISTRATION
5555 Ridge Ave., Cincinnati, Ohio 45213

November 30, 1970

Mr. V. K. McEwan
Thomson, Rogers Barristers & Solicitors
200 Richmond-Adelaide Centre
120 Adelaide St., W.
Toronto 110, Ontario

Dear Mr. McEwan:

Enclosed is a list of companies known to discharge or to have discharged mercury to the water of Lake Erie or its tributaries. Also attached is a copy of the report on mercury that was prepared for and presented at the June 3, 1970, conference on Lake Erie at Detroit, Michigan.

Sincerely yours,

/s/ LOWELL A. VAN DEN BERG
L. A. Van Den Berg
Assistant to Director
Division of Field
Investigations, Cinti.
Office of Enforcement &
Standards Compliance
FWQA

Enclosures

List of mercury discharges

Report—"Investigation of Mercury
in the St. Clair River-Lake Erie Systems"

LIST OF COMPANIES KNOWN TO DISCHARGE OR
TO HAVE DISCHARGED MERCURY TO
LAKE ERIE OR ITS TRIBUTARIES

Wyandotte Chemical Co.
Wyandotte, Mich.

Detrex Chemical Industries
Ashtabula, Ohio

General Electric Chemical Products Plant
Cleveland, Ohio

Harshaw Chemical Co.
Div. of Kewanee Oil Co.
Elyria, Ohio

Mallinckrodt Chemical Works
Calsical Division
Erie, Penna.

Nosco Plastics
Erie, Penna.

Allied Chemical Co.
Buffalo Dye Div.
Buffalo, New York

National Aeronautics & Space Administration
Lewis Research Center
Cleveland, Ohio

11-30-70

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

OHIO *v.* WYANDOTTE CHEMICALS CORP. ET AL.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

No. 41, Orig. Argued January 18, 1971—Decided March 23, 1971

The State of Ohio filed a motion for leave to file a bill of complaint invoking the Court's original jurisdiction against defendant companies, incorporated in Michigan, Delaware, and Canada, to abate an alleged nuisance resulting in the contamination and pollution of Lake Erie from the dumping of mercury into its tributaries. The Court declines to exercise its jurisdiction in this case since the issues are bottomed on local law that the Ohio courts are competent to consider, several national and international bodies are actively concerned with the pollution problems involved here, and the nature of the case requires the resolution of complex, novel, and technical factual questions that do not implicate important problems of federal law, which are the primary responsibility of the Court.

Denied.

HARLAN, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACK, BRENNAN, STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined. DOUGLAS, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 41, Orig.—OCTOBER TERM, 1970

State of Ohio, Plaintiff,	}	On Motion for Leave to File Bill of Complaint.
v.		
Wyandotte Chemicals Corporation et al.		

[March 23, 1971]

MR. JUSTICE HARLAN delivered the opinion of the Court.

By motion for leave to file a bill of complaint, Ohio seeks to invoke this Court's original jurisdiction. Because of the importance and unusual character of the issues tendered we set the matter for oral argument, inviting the Solicitor General to participate and to file a brief on behalf of the United States, as *amicus curiae*. For reasons that follow we deny the motion for leave to file.

The action is for abatement of a nuisance, is brought on behalf of the State and its citizens, and names as defendants Wyandotte Chemicals Corporation (Wyandotte), Dow Chemical Company (Dow America), and Dow Chemical Company of Canada, Limited (Dow Canada). Wyandotte is incorporated in Michigan and maintains its principal office and place of business there. Dow America is incorporated in Delaware, has its principal office and place of business in Michigan, and owns all the stock of Dow Canada. Dow Canada is incorporated, and does business, in Ontario. A majority of Dow Canada's directors are residents of the United States.

The complaint alleges that Dow Canada and Wyandotte have each dumped mercury into streams whose courses ultimately reach Lake Erie, thus contaminating and polluting that lake's waters, vegetation, fish, and wildlife and that Dow America is jointly responsible for the acts of its foreign subsidiary. Assuming the State's ability to prove these assertions, Ohio seeks a decree: (1) declaring the introduction of mercury into Lake Erie's tributaries a public nuisance; (2) perpetually enjoining these defendants from introducing mercury into Lake Erie or its tributaries; (3) requiring defendants either to remove the mercury from Lake Erie or to pay the costs of its removal into a fund to be administered by Ohio and used only for that purpose; (4) directing defendants to pay Ohio monetary damages for the harm done to Lake Erie, its fish, wildlife, and vegetation, and the citizens and inhabitants of Ohio.

Original jurisdiction is said to be conferred on this Court by Article III of the Federal Constitution. Section 2, Clause 1, of that Article, provides: "The judicial power shall extend . . . to Controversies . . . between a State and Citizens of another State . . . and between a State . . . and foreign . . . Citizens or Subjects." Section 2, Clause 2, provides: "In all Cases . . . in which a State shall be a Party, the supreme Court shall have original Jurisdiction." Finally, 28 U. S. C. § 1251 (b) (3) provides: "The Supreme Court shall have original but not exclusive jurisdiction of . . . [a]ll actions or proceedings by a State against the citizens of another State or against aliens."

While we consider that Ohio's complaint does state a cause of action that falls within the compass of our original jurisdiction, we have concluded that this Court should nevertheless decline to exercise that jurisdiction.

I

That we have jurisdiction seems clear enough.¹ Beyond doubt, the complaint on its face reveals the existence of a genuine "case or controversy" between one State and citizens of another, as well as a foreign subject. Diversity of citizenship is absolute. Nor is the nature of the cause of action asserted a bar to the exercise of our jurisdiction. While we have refused to entertain, for example, original actions designed to exact compliance with a State's penal laws, *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265 (1888), or that seek to embroil this tribunal in "political questions," *Mississippi v. Johnson*, 4 Wall. 475 (1866); *Georgia v. Stanton*, 6 Wall. 50 (1867), this Court has often adjudicated controversies between States and between a State and citizens of another State seeking to abate a nuisance that exists in one State yet produces noxious consequences in another. See *Missouri v. Illinois and The Sanitary Dist. of Chicago*, 180 U. S. 208 (1901) (complaint filed), 200 U. S. 496 (1906) (final judgment); *Georgia v. Tennessee Copper Co.*, 206 U. S. 230 (1907); *New York v. New Jersey*, 256 U. S. 296 (1921); *New Jersey v. New York City*, 283 U. S. 473 (1931). In short, precedent leads almost ineluctably to the conclusion that we are empowered to resolve this dispute in the first instance.²

¹ The matter is well treated in the Solicitor General's *amicus* brief, which satisfactorily deals with a number of considerations which we find it unnecessary to discuss in this opinion.

² While we possess jurisdiction over Dow America and Wyandotte simply on the basis of their citizenship, the problem with respect to Dow Canada is quite different with regard to two major issues: whether that foreign corporation has "contacts" of the proper sort sufficient to bring it personally before us, and whether service of process can lawfully be made upon Dow Canada. Were we to decide to entertain this complaint, however, it seems reasonably clear that

Ordinarily, the foregoing would suffice to settle the issue presently under consideration: whether Ohio should be granted leave to file its complaint. For it is a time-honored maxim of the Anglo-American common law tradition that a court possessed of jurisdiction generally must exercise it. *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821). Nevertheless, although it may initially have been contemplated that this Court would always exercise its original jurisdiction when properly called upon to do so, it seems evident to us that changes in the American legal system and the development of American society have rendered untenable, as a practical matter, the view that this Court must stand willing to adjudicate all or most legal disputes that may arise between one State and a citizen or citizens of another, even though the dispute may be one over which this Court does have original jurisdiction.

As our social system has grown more complex, the States have increasingly become enmeshed in a multitude of disputes with persons living outside their borders. Consider, for example, the frequency with which States and non-residents clash over the application of state laws concerning taxes, motor vehicles, decedents' estates, business torts, government contracts and so forth. It would, indeed, be anomalous were this Court to be held out as a potential principal forum for settling such controversies. The simultaneous development of "long-arm jurisdiction" means, in most instances, that no necessity impels us to perform such a role. And the evolution of this Court's responsibilities in the American legal system has brought matters to a point where much would be

the better course would be to reserve this aspect of the jurisdictional issue pending ascertainment of additional facts, rather than to resolve it now. Thus, for purposes of ruling on Ohio's motion for leave to file its complaint, we treat the question of jurisdiction over all three defendants as a unitary one.

sacrificed, and little gained, by our exercising original jurisdiction over issues bottomed on local law. This Court's paramount responsibilities to the national system lie almost without exception in the domain of federal law. As the impact on the social structure of federal common, statutory, and constitutional law has expanded, our attention has necessarily been drawn more and more to such matters. We have no claim to special competence in dealing with the numerous conflicts between States and non-resident individuals that raise no serious issues of federal law.

This Court is, moreover, structured to perform as an appellate tribunal, ill-equipped for the task of fact-finding and so forced, in original cases, awkwardly to play the role of fact-finder without actually presiding over the introduction of evidence. Nor is the problem merely our lack of qualifications for many of these tasks potentially within the purview of our original jurisdiction; it is compounded by the fact that for every case in which we might be called upon to determine the facts and apply unfamiliar legal norms we would unavoidably be reducing the attention we could give to those matters of federal law and national import as to which we are the primary overseers.

Thus, we think it apparent that we must recognize "the need [for] the exercise of a sound discretion in order to protect this Court from an abuse of the opportunity to resort to its original jurisdiction in the enforcement by States of claims against citizens of other States." *Massachusetts v. Missouri*, 308 U. S. 1, 19 (1939), opinion of Chief Justice Hughes. See also *Georgia v. Pennsylvania R. Co.*, 324 U. S. 439, 464-465 (1945), and *id.*, at 469-471 (dissenting opinion).³ We believe, however, that

³ In our view the federal statute, 28 U. S. C. § 1251 (b) (3), providing that our original jurisdiction in cases such as these is merely con-

the focus of concern embodied in the above-quoted statement of Chief Justice Hughes should be somewhat refined. In our opinion, we may properly exercise such discretion not simply to shield this Court from noisome, vexatious, or unfamiliar tasks, but also, and we believe principally, as a technique for promoting and furthering the assumptions and value choices that underlie the current role of this Court in the federal system. Protecting this Court *per se* is at best a secondary consideration. What gives rise to the necessity for recognizing such discretion is pre-eminently the diminished societal concern in our function as a court of original jurisdiction and the enhanced importance of our role as the final federal appellate court. A broader view of the scope and purposes of our discretion would inadequately take account of the general duty of courts to exercise that jurisdiction they possess.

Thus, at this stage we go no further than to hold that, as a general matter, we may decline to entertain a complaint brought by a State against the citizens of another State or country only where we can say with assurance that (1) declination of jurisdiction would not disserve any of the principal policies underlying the Article III jurisdictional grant and (2) the reasons of

current with that of the federal district courts, reflects this same judgment. However, this particular case cannot be disposed of by transferring it to an appropriate federal district court since this statute by itself does not actually confer jurisdiction on those courts, see C. Wright, *Federal Courts*, at 502 (2d ed. 1970), and no other statutory jurisdictional basis exists. The fact that there is diversity of citizenship among the parties would not support district court jurisdiction under 28 U. S. C. § 1332 because that statute does not deal with cases in which a State is a party. Nor would federal question jurisdiction exist under 28 U. S. C. § 1331. So far as it appears from the present record, an action such as this, if otherwise cognizable in federal district court, would have to be adjudicated under state law. *Erie R. Co. v. Tompkins*, 304 U. S. 64 (1938).

practical wisdom that persuade us that this Court is an inappropriate forum are consistent with the proposition that our discretion is legitimated by its use to keep this aspect of the Court's functions atune with its other responsibilities.

II

In applying this analysis to the facts here presented, we believe that the wiser course is to deny Ohio's motion for leave to file its complaint.

A

Two principles seem primarily to have underlain conferring upon this Court original jurisdiction over cases and controversies between a State and citizens of another State or country. The first was the belief that no State should be compelled to resort to the tribunals of other States for redress, since parochial factors might often lead to the appearance, if not the reality, of partiality to one's own. *Chisholm v. Georgia*, 2 Dall. 419, 475-476 (1793); *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 289 (1888). The second was that a State, needing an alternative forum, of necessity had to resort to this Court in order to obtain a tribunal competent to exercise jurisdiction over the acts of nonresidents of the aggrieved State.

Neither of these policies is, we think, implicated in this lawsuit. The courts of Ohio, under modern principles of the scope of subject matter and *in personam* jurisdiction, have a claim as compelling as any that can be made out for this Court to exercise jurisdiction to adjudicate the instant controversy, and they would decide it under the same common law of nuisance upon which our determination would have to rest. In essence, the State has charged Dow Canada and Wyandotte with the commission of acts, albeit beyond Ohio's territorial bound-

aries, that have produced and it is said, continue to produce disastrous effects within Ohio's own domain. While this Court, and doubtless Canadian courts, if called upon to assess the validity of any decree rendered against either Dow Canada or Wyandotte, would be alert to ascertain whether the judgment rested upon an even-handed application of justice, it is unlikely that we would totally deny Ohio's competence to act if the allegations made here are proved true. See, *e. g.*, *International Shoe Co. v. State of Washington*, 326 U. S. 310 (1945); *United States v. Aluminum Co. of America*, 148 F. 2d 416 (CA2 1945); ALI, *Restatement of the Foreign Relations Law of the United States* 2d, § 18. And while we cannot speak for Canadian courts, we have been given no reason to believe they would be less receptive to enforcing a decree rendered by Ohio courts than one issued by this Court. Thus, we do not believe exercising our discretion to refuse to entertain this complaint would undermine any of the purposes for which Ohio was given the authority to bring it here.

B

Our reasons for thinking that, as a practical matter, it would be inappropriate for this Court to attempt to adjudicate the issues Ohio seeks to present are several. History reveals that the course of this Court's prior efforts to settle disputes regarding interstate air and water pollution has been anything but smooth. In *Missouri v. Illinois*, 200 U. S. 496, 520-522 (1906), Justice Holmes was at pains to underscore the great difficulty that the Court faced in attempting to pronounce a suitable general rule of law to govern such controversies. The solution finally grasped was to saddle the party seeking relief with an unusually high standard of proof and the Court with the duty of applying only legal principles "which it is prepared deliberately to maintain against all

considerations on the other side," *id.*, at 521, an accommodation which, in cases of this kind, the Court has found necessary to maintain ever since.⁴ See, e. g., *New York v. New Jersey*, 256 U. S. 296, 309 (1921). Justice Clarke's closing plea in *New York v. New Jersey*, *supra*, at 313, strikingly illustrates the sense of futility that has accompanied this Court's attempts to treat with the complex technical and political matters that inhere in all disputes of the kind at hand:

"We cannot withhold the suggestion, inspired by the consideration of this case, that the grave problem of sewage disposal presented by the large and growing populations living on the shores of New York Bay is one more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court however constituted."

The difficulties that ordinarily beset such cases are severely compounded by the particular setting in which this controversy has reached us. For example, the parties have informed us, without contradiction, that a number of official bodies are already actively involved in regulating the conduct complained of here. A Michigan circuit court has enjoined Wyandotte from operating its mercury cell process without judicial authorization. The company is, moreover, currently utilizing

⁴ Justice Holmes' analysis appears to rest, in part, on the fact that in the case before him the conduct complained of was the act of a sovereign State. However, we see no reason why the determination to impose a high standard of proof would not be equally compelling in a case such as the one before us. Arguably, the necessity for applying virtually unexceptionable legal principles does not obtain where conduct never previously subjected to state law scrutiny is involved, but this is not the case here. See text, *infra*.

a recycling process specifically approved by the Michigan Water Resources Commission and remains subject to the continued scrutiny of that agency. Dow Canada reports monthly to the Ontario Water Resources Commission on its compliance with the commission's order prohibiting the company from passing any mercury into the environment.

Additionally, Ohio and Michigan are both participants in the Lake Erie Enforcement Conference, convened a year ago by the Secretary of the Interior pursuant to the Federal Water Pollution Control Act. The Conference is studying all forms and sources of pollution, including mercury, infecting Lake Erie. The purpose of this Conference is to provide a basis for concerted remedial action by the States or, if progress in that regard is not rapidly made, for corrective proceedings initiated by the Federal Government. 33 U. S. C. § 446g (Supp. V). And the International Joint Commission, established by the Boundary Waters Treaty of 1909 between the United States and Canada, issued on January 14, 1971, a comprehensive report, the culmination of a six-year study carried out at the request of the contracting parties, concerning the contamination of Lake Erie. That document makes specific recommendations for joint programs to abate these environmental hazards and recommends that the IJC be given authority to supervise and coordinate this effort.

In view of all this, granting Ohio's motion for leave to file would, in effect, commit this Court's resources to the task of trying to settle a small piece of a much larger problem that many competent adjudicatory and conciliatory bodies are actively grappling with on a more practical basis.

The nature of the case Ohio brings here is equally disconcerting. It can fairly be said that what is in dispute is not so much the law as the facts. And the

factfinding process we are asked to undertake is, to say the least, formidable. We already know, just from what has been placed before us on this motion, that Lake Erie suffers from several sources of pollution other than mercury; that the scientific conclusion that mercury is a serious water pollutant is a novel one; that whether and to what extent the existence of mercury in natural waters can safely or reasonably be tolerated is a question for which there is presently no firm answer; and that virtually no published research is available describing how one might extract mercury that is in fact contaminating water. Indeed, Ohio is raising factual questions that are essentially ones of first impression to the scientists. The notion that appellate judges, even with the assistance of a most competent Special Master, might appropriately undertake at this time to unravel these complexities is to say the least unrealistic. Nor would it suffice to impose on Ohio an unusually high standard of proof. That might serve to mitigate our personal difficulties in seeking a just result that comports with sound judicial administration, but would not lessen the complexity of the task of preparing responsibly to exercise our judgment, nor the serious drain on the resources of this Court it would entail. Other factual complexities abound. For example, the Department of the Interior has stated that eight American companies are discharging, or have discharged, mercury into Lake Erie or its tributaries. We would, then, need to assess the business practices and relative culpability of each to frame appropriate relief as to the one now before us.

Finally, in what has been said it is vitally important to stress that we are not called upon by this lawsuit to resolve difficult or important problems of federal law and that nothing in Ohio's complaint distinguishes it from any one of a host of such actions that might, with equal justification, be commenced in this Court. Thus, enter-

taining this complaint not only would fail to serve those responsibilities we are principally charged with, but could well pave the way for putting this Court into a quandary whereby we must opt either to pick and choose arbitrarily among similarly situated litigants or to devote truly enormous portions of our energies to such matters.

To sum up, this Court has found even the simplest sort of interstate pollution case an extremely awkward vehicle to manage. And this case is an extraordinarily complex one both because of the novel scientific issues of fact inherent in it and the multiplicity of governmental agencies already involved. Its successful resolution would require primarily skills of factfinding, conciliation, detailed coordination with—and perhaps not infrequent deference to—other adjudicatory bodies, and close supervision of the technical performance of local industries. We have no claim to such expertise nor reason to believe that, were we to adjudicate this case, and others like it, we would not have to reduce drastically our attention to those controversies for which this Court is a proper and necessary forum. Such a serious intrusion on society's interest in our most deliberate and considerate performance of our paramount role as the supreme federal appellate court could, in our view, be justified only by the strictest necessity, an element which is evidently totally lacking in this instance.

III

What has been said here cannot, of course, be taken as denigrating in the slightest the public importance of the underlying problem Ohio would have us tackle. Reversing the increasing contamination of our environment is manifestly a matter of fundamental import and utmost urgency. What is dealt with above are only considerations respecting the appropriate role this Court can assume in efforts to eradicate such environmental blights.

We mean only to suggest that our competence is necessarily limited, not that our concern should be kept within narrow bounds.

Ohio's motion for leave to file its complaint is denied without prejudice to its right to commence other appropriate judicial proceedings.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 41, Orig.—OCTOBER TERM, 1970

State of Ohio, Plaintiff, v. Wyandotte Chemicals Corporation et al.	}	On Motion for Leave to File Bill of Complaint.
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[March 23, 1971]

MR. JUSTICE DOUGLAS, dissenting.

The complaint in this case presents basically a classic type of case congenial to our original jurisdiction. It is to abate a public nuisance. Such was the claim of Georgia against a Tennessee company which was discharging noxious gas across the border into Georgia. *Georgia v. Tennessee Copper Co.*, 206 U. S. 230. The Court said:

"It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source." *Id.*, at 238.

Dumping of sewage in an interstate stream, *Missouri v. Illinois*, 200 U. S. 496, or towing garbage to sea only to have the tides carry it to a State's beaches, *New Jersey v. New York City*, 283 U. S. 473, have presented analogous situations which the Court has entertained in suits invoking our original jurisdiction. The pollution of Lake Erie or its tributaries by the discharge of mercury or compounds thereof, if proved, certainly creates a public nuisance of a seriousness and magnitude which a State

by our historic standards may prosecute or pursue as *parens patriae*.

The suit is not precluded by the Boundary Waters Treaty of 1909, 36 Stat. 2450. Article 4 provides that the "boundary waters . . . shall not be polluted on either side to the injury of health or property on the other." But there is no machinery for direct enforcement of Article 4.

Article 8 empowers the International Joint Commission "to pass upon all cases involving the use or obstruction or diversion of the waters with respect to which under Articles 3 and 4 . . . the approval of this Commission is required." Those Articles specifically describe the type of projects for which approval is required. For example, Article 4 states that the "Parties . . . will not permit the construction or maintenance . . . of any remedial or protective works or any dams or other obstructions . . . the effect of which is to raise the natural level of waters on the other side of the boundary, unless . . . approved by the . . . Commission." Significantly, the proscription of pollution, which immediately follows this provision in Article 4, does not mention approval or action by the International Joint Commission.

Article 10 does vest the Commission with power to render binding decisions on matters referred by consent of both parties. But Article 10 states that any joint reference "on the part of the United States . . . will be by and with the advice and consent of the Senate and on the part of His Majesty's Government with the consent of the Governor-General in Council."

In other words, so far as pollution is concerned, the Treaty contains no provision for binding arbitration. Thus, it does not evince a purpose on the part of the national Governments of the United States and Canada to exclude their States and Provinces from seeking other remedies for water pollution. Indeed Congress in

later addressing itself to water pollution in the Federal Water Pollution Control Act, 33 U. S. C. § 1151, said in § 1 (c):

"Nothing in this Act shall be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including *boundary waters*) of such States."

This litigation, as it unfolds, will of course implicate much federal law. The case will deal with an important portion of the federal domain—the navigable streams and the navigable inland waters which are under the sovereignty of the Federal Government. It has been clear since *Pollard's Lessee v. Hagan*, 3 How. 212, decided in 1845, that navigable waters were subject to federal control. That paramount federal dominion extends into the oceans beyond low tide. *United States v. California*, 332 U. S. 19.

Congress has enacted numerous laws reaching that domain. One of the most pervasive is the Rivers and Harbors Act of 1899, 30 Stat. 1121, as amended, 33 U. S. C. § 403, which was before us in *United States v. Republic Steel Corp.*, 362 U. S. 482. In that case we read § 13 of the 1899 Act, 33 U. S. C. § 407, which forbids discharge of "any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state" as including particles in suspension. *Id.*, at 490.

In the 1930's fish and wildlife legislation was enacted granting the Secretary of the Interior various heads of jurisdiction over the effects of fish and wildlife of "domestic sewage, mine, petroleum, and industrial wastes, erosion silt, and other polluting substances." See, *e. g.*, 16 U. S. C. § 665. Among other things the Secretary of the Interior through the Fish and Wildlife Service gave advice to the Corps of Engineers as respects the effects

which proposed dredging or filling of estuaries would have on fish or wildlife.¹

Since that time other changes have been made in the design of the federal system of water control. The Federal Water Pollution Control Act, as amended, 33 U. S. C. § 1151, gives broad powers to the Secretary to take action respecting water pollution on complaints of States and other procedures to secure federal abatement of the pollution. *Ibid.* The National Environmental Policy Act of January 1, 1970, 83 Stat. 852, 42 U. S. C. § 4331, gives elaborate ecological directions to federal agencies and supplies procedures for their enforcement.

On December 25, 1970, the President issued an Executive Order² which correlates the duties of the Corps of Engineers and the Administrator of the new Environmental Protection Agency under the foregoing statutes. Under that Executive Order the Corps in order "to regulate the discharge of pollutants and other refuse matter into the navigable waters of the United States or their tributaries" is directed after consultation with the Administrator to amend its regulations concerning issuance of permits. While the Corps is responsible for granting or denying permits, § 2 (a) (2), it *must* accept the findings of the Administrator respecting "water quality standards," § 2(a)(2)(A). On December 31, 1970, the Corps gave notice of its new proposed rules to govern discharges or deposits into navigable waters.³

Yet the federal scheme is not preemptive of state action. Section 1 (b) of the Water Pollution Control Act declares that the policy of Congress is "to recognize, pre-

¹ See Hearings, Subcommittee on Fisheries & Wildlife Conservation, H. R. Committee on Merchant Marine & Fisheries, 90th Cong., 1st Sess., Serial No. 90-3, pp. 32 *et seq.*

² Exec. Order No. 11574, 35 Fed. Reg. 19627.

³ 35 Fed. Reg. 20005. And see 36 Fed. Reg. 983 concerning its proposed policy, practice and procedure in that regard.

serve, and protect the primary responsibilities and rights of the States in preventing and controlling water pollution." Section 10 provides that except where the Attorney General has actually obtained a court order of pollution abatement on behalf of the United States, "State and interstate action to abate pollution of . . . or navigable waters . . . shall not . . . be displaced by federal enforcement action." § 10 (b).

The new Environmental Quality Improvement Act of April 3, 1970, 84 Stat. 114, 42 U. S. C. § 4371, while stating the general policy of Congress in protecting the environment also states "The primary responsibility for implementing this policy rests with State and local governments." 42 U. S. C. § 4371 (b)(2).

There is much complaint that in spite of the arsenal of federal power little is being done.⁴ That of course is not our problem. But it is our concern that state action is not preempted by federal law. Under existing federal law, the States do indeed have primary responsibility for setting water quality standards; the federal agency only sets water quality standards for a State if the State defaults. 33 U. S. C. § 1160 (c).

There is not a word in federal law that bars state action. If, however, defendants had a permit from the Corps to discharge mercury into federal waters, the question would be vastly different. But they do not, and so far as appears they are not under any federal process and are not parties to any federal proceedings. In light of the history of water pollution control efforts in this country it cannot be denied that a vast residual authority rests in the States. And there is no better established remedy in state law than authority to abate a nuisance.⁵

⁴ See Polikoff, *The Interlake Affair*, 3 Wash. Monthly 7 (1971).

⁵ 2 Blackstone Commentaries p. *218 (Cooley 4th ed. 1899):

" . . . it is a nuisance to stop or divert water that used to run to another's meadow or mill; to corrupt or poison a water course, by

Much is made of the burdens and perplexities of these original actions. Some are complex, notably those involving water rights.

The drainage of Lake Michigan with the attendant lowering of water levels, affecting Canadian as well as United States interests, came to us in an original suit in which the Hon. Charles E. Hughes was Special Master. This Court entered a decree, *Wisconsin v. Illinois*, 278 U. S. 367, and has since that time entered supplementary decrees.⁶

The apportionment of the waters of the Colorado between Arizona and California was a massive undertaking entailing a searching analysis by the Special Master, the Hon. Simon H. Rifkind. Our decision was based on the record made by him and on exceptions to his Report. *Arizona v. California*, 373 U. S. 546.

The apportionment of the waters of the North Platte River among Colorado, Wyoming, and Nebraska came to us in an original action in which we named as Special Master, Hon. Michael J. Doherty. We entered a complicated decree, which dissenters viewed with alarm, *Nebraska v. Wyoming*, 325 U. S. 589, but which has not demanded even an hour of the Court's time during the 26 years since it was entered.

If in these original actions we sat with a jury, as the Court once did,⁷ there would be powerful arguments for abstention in many cases. But the practice has been to

erecting a dyehouse or lime-pit for the use of trade, in the upper part of the stream; or in short to do any act therein that in its consequences must necessarily tend to the prejudice of one's neighbour? So closely does the law of England enforce that excellent rule of gospel morality, of 'doing to others as we would they should do unto ourselves.'"

⁶ 281 U. S. 179, 696; 289 U. S. 395; 309 U. S. 569; 311 U. S. 107; 313 U. S. 547; 388 U. S. 426.

⁷ *Georgia v. Brailsford*, 3 Dall. 1.

appoint a Special Master which we certainly would do in this case. We could also appoint—or authorize the Special Master to retain—a panel of scientific advisers. The problems in this case are simple compared with those in the water cases, discussed above. It is now known that metallic mercury deposited in water is often transformed into a dangerous chemical. This law suit would determine primarily the extent, if any, to which the defendants are contributing to that contamination at the present time. It would determine, secondarily, the remedies within reach—the importance of mercury in the particular manufacturing processes, the alternative processes available, the need for a remedy against a specified polluter as contrasted to a basin-wide regulation, and the like.

The problem, though clothed in chemical secrecies, can be exposed by the experts. It would indeed be one of the simplest problems yet posed in the category of cases under the head of our original jurisdiction.

The Department of Justice in a detailed brief tells us there are no barriers in federal law to our assumption of jurisdiction.⁸ I can think of no case of more transcending public importance than this one.

⁸ The case is therefore not an appropriate one for application of the teaching of *Massachusetts v. Mellon*, 262 U. S. 447, 485-486, that "While the State, under some circumstances, may sue (as *parens patriae*) for the protection of its citizens (*Missouri v. Illinois*, 180 U. S. 208, 241), it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriae*, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status."